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CONTEXTUALISING COMPANY LAW: A COMPARISON OF CANADIAN AND NIGERIAN SHAREHOLDERS' REMEDIES

BY ©

BONIFACE UHUNMWUNARABONA AHUNWAN

A thesis submitted to the Faculty of Graduate Studies and Research in
partial fulfilment of the requirements for the degree of
MASTER OF LAWS.

FACULTY OF LAW
EDMONTON, ALBERTA
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ABSTRACT

This thesis compares Nigerian shareholders' remedies to those in the *Canada Business Corporations Act* R.S.C. 1985, c. C-44. Its central objective is to measure the success of Nigerian corporate law in protecting the shareholders as well as to suggest how the Nigerian legislators and the judiciary might improve upon that protection. Essentially it weighs the remedies in the light of the socio-economic, political and cultural milieu in Nigeria.

Preliminary to undertaking such an investigation, this thesis will explore a number of jurisprudential schools of thought which analyse the corporate vehicle, either directly or indirectly. The reason for such a survey is to locate a theoretical approach which is adjusted to the value of encouraging economic growth, investment, and stability in a developing country like Nigeria. After assessing, in an introductory manner, the leading theoretical approaches to the corporate model, this thesis ultimately endorses the approach taken by the Neo-pragmatic school.

DEDICATION

-- All that are wise and wonderful, the Lord God made them all - -
- - To God be the Glory - -

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INTRODUCTION

I. Overview

In modern society, the corporation occupies an important position in the economic system. It plays a vital role in the production and distribution of resources. It also has an overwhelming impact, directly and indirectly, on the social, economic and political life of the people.

The strength and survival of the corporation depend greatly on public confidence in the corporate form. It is this confidence which encourages investors to put resources together to form "the body corporate"-- the corporation. Accordingly, it is essential that modern corporations law provides adequate protection with suitable remedies to shareholders to redress conduct which injures the corporation, the shareholders, or both.

One of the chronic problems facing Nigerian corporate law has been the protection of shareholders. The paths taken in Nigeria to address shareholder abuse include adopting the British common law approach, adopting the British statutory approach, and, most recently, adopting the Canadian approach. The central objective of this thesis will be to measure the success of Nigerian corporate law in providing remedial protection for shareholders as well as to suggest steps to improve upon that protection.

Preliminary to undertaking such an investigation, this thesis will explore a number of jurisprudential schools of thought which analyse the corporate vehicle, either directly or indirectly. The reason for undertaking such a survey is to locate a theoretical approach which is adjusted to the value of encouraging economic growth, investment, and stability in a developing country like Nigeria. It will be seen that radical approaches -- as suggested by certain members of the Critical Legal Studies Movement, for example -- have not been formulated to accommodate or acknowledge the value of incremental improvement or even the creation of wealth. These formulations are naively academic. The author contends that in countries plagued by hunger, poor information and communication systems, as well as ecological problems, a certain pragmatism is in order.[1] After assessing, in an introductory manner, the leading theoretical approaches to the corporate model, this chapter ultimately adopts the approach taken by the neo-pragmatic school because the approach allows intellectual tolerance while still maintaining an independent value.

Chapter One concludes that the effectiveness of any given shareholders' remedy cannot be assessed in the abstract. To understand how a given remedy will actually work, it must be located within the Nigerian socio-economic, political and cultural context.

Chapter Two seeks to describe those features of Nigerian society which are relevant to assessing how a given shareholders' remedy might operate in practice. It notes that any system of corporate law drafted without regard to these factors will be less than effective.

The subsequent chapters consider shareholders' remedies in Canada and Nigeria. Since much of modern Nigerian corporations law borrows from the *Canada Business*

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[1] The examination of shareholders' remedies together with these theoretical formulations is highly important. This is because shareholders' remedies greatly reflect the ideology of the corporation. As stated by David Sugarman, the shareholders' remedy,

> symbolises and constitutes the core of the classical conception of company law, helping to define its values, perimeters and self identity. . . . [B]ecause of the mutual dependencies between the law and procedures governing shareholder remedies and other aspects of company law, the reform of shareholder remedies has a wider significance within and beyond the jurisprudence and practice of company law.

See, "Reconceptualising Company Law: Reflections on the Law Commission's Consultation Paper on Shareholder Remedies (Part 1)" (1997) 18 Company Lawyer 226 at 226.

Corporations Act[2] (hereinafter the "CBCA"), it is an appropriate referent against which to assess the effectiveness of the shareholders' remedies in Nigeria as well as to predict how the law might develop there. More specifically, this thesis will consider the shareholders' derivative action in Chapter Three, the oppression and unfair prejudice remedy in Chapter Four and, in Chapter Five, the administrative control which can be visited upon a corporation as a corrective to shareholder abuse. Most importantly, the thesis seeks to dissect these various remedies by exploring the features of Nigerian life that might impact on their operation and efficacy. Furthermore, it identifies the resources necessary to the proper operation of these remedies as well as some of the sources, causes and effects of abuse of the corporate form in the developing, Nigerian economy. In this way, the suitability of a given remedy is weighed contextually.

II. An Introduction to Nigerian Company Law

Company law as well stated by Professor Orojo, is "foreign to the customary and indigenous system of laws in Nigeria and its history is part of the history of the received English law which has become incorporated into the Nigerian legal system."[3] From 1912 to 1960, there were different company ordinances,[4] but the first comprehensive company law statute was the *Companies Decree* No 51 of 1968.[5] The 1968 Act did nothing other than re-enact the British *Companies Act* 1948. Consequently, the Act was faulty because it was not enacted within the context of the Nigerian local environment. It was therefore unable to match the country's level of development and its aspirations for greater economic growth.[6]

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[2] R.S.C. 1985, c. C-44.

[3] See J.O. Orojo, *Company Law and Practice in Nigeria*, 3rd. ed. (Lagos: Mbeyi and Ass., 1992) at 16. Professor Orojo also makes a brief survey of Nigerian company law since the reception of English law in Nigeria in 1861 (at 16-23).

[4] *Ibid.* at 18-19.

In Nigeria, because the corporate concept was novel, combined with the unsophisticated nature of the shareholders, there has always been the need to give ample protection to these shareholders. This is to encourage the growth of the corporation and also the national economy. It is also to encourage the inflow of foreign capital which in modern times is indispensable to economic development. Although other variables affect business and the attraction of foreign shareholders, such as political stability and enforcement of law and order, the protection afforded to shareholders is also a major factor.[7]

The Nigerian legislators took the initiative in 1990 by enacting the *Companies and Allied Matters Act*[8] (hereinafter "CAMA"), to match Nigerian corporate law with the need for economic development. As one of its strategies, the legislation emphasized greater protection for shareholders by the provision of wider shareholders' remedies. Even though structurally, the Act retains the British memorandum and articles model, it also adopted the Canadian approach to shareholders' remedies by making provision for the derivative action, a liberal oppression and unfair prejudice remedy, and other personal remedies. It also provided for administrative control through the Corporate Affairs Commission.[9]

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[5] This was promulgated by a Military government in 1968 but during the democratic government that started in 1979, the decree was redesignated as the *Companies Act* 1968. S.I. 1980 No 13.

[6] See Nigerian Law Reform Commission, *Working Papers on the Reform of Nigerian Company Law* (Vol. 1: Review and Recommendations) (Lagos: NLRC, 1989) at 1-2.

[7] It has been aptly demonstrated in America for instance, that even in the country where there is an equal level of economic stability, incorporators incorporate or reincorporate in states with more protective corporate law either in terms of its liberal approach or the availability of resources to settle corporate disputes. See R.Romano, "The State Competition Debate in Corporate Law" in R. Romano, ed., *Foundations of Corporate Law* (New York: Oxford University Press, 1993) 87, R. Romano, *The Genius of American Corporate Law* (Washington D.C.: A.E.I.Press, 1993 at 4-31 and W.Carry, "Federalism and Corporate Law: Reflections Upon Delaware" (1974) 88 Yale L.J. 663 at 665-666 and 668-672.

[8] Cap. 59 Laws of the Federation of Nigeria 1990. This was formerly refered to as the *Companies and Allied Matters Decree* 1990. By the consolidation of the Law of the Federation of Nigeria in 1990, it was redesignated as the *Companies and Allied Matters Act* 1990.

III. Context

The socio-economic, political and cultural environment in Nigeria differs from the Canadian ones. Economically, Nigeria is less developed than Canada. This lower level of development impacts on business, corporate organization and behaviour, and the general life of the people in a variety of ways. For instance, it leads to an inadequate infrastructure, poor communication network and social problems such as corruption. This thesis emphasizes the relationship between these kinds of problems and the efficiency of shareholders' remedies in Nigeria.

IV. Organization

The thesis is divided into two parts. Part One is a theoretical and contextual analysis. It is divided into two chapters: the first chapter examines the contemporary theories of corporate law and their relation to shareholders' remedies. It examines different propositions on the aims and objectives of corporate law, the parties involved in the corporation who should be protected, and the proper mechanisms for protection. The second chapter examines the socio-economic, political and cultural setting in Nigeria. It focuses specially on how these factors affect shareholders' remedies.

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[9] This is the body entrusted with the administration of the CAMA, the equivalent of the Corporate Registry in Canada.

Part Two is a comparative analysis of the shareholders' remedies in Nigeria and Canada in the context of the theoretical and contextual analysis carried out in Part One. This Part is also divided into three chapters. Chapter Three examines the derivative suit, Chapter Four examines the oppression remedy while Chapter Five deals with the personal and administrative remedies also available to shareholders. In all these three chapters, emphasis is on how remedies must be assessed in relation to the local context.

The final chapter concludes with a summary of the overall effects of the socio-economic, political and cultural factors on shareholders' remedies. It also make suggestions and recommendations on appropriate strategies and structures necessary for corporate law to solve the peculiar problems that result from such factors. It advises on the approach that the Nigerian judiciary should employ in granting remedies to the abused shareholder.

V. Terminology

The legal terminology governing Nigerian and Canadian corporate law are virtually the same. However some words are more in use in one jurisdiction than the other. In this thesis, the following words are used interchangeably:

a. Corporations law/company law; or company law /corporate law.

b. Corporations Act/Company Act (except where it forms part of the name of a particular statute.)

Reference to Canadian corporate/corporations law refers to federal corporate law contained in the CBCA. It does not include the practice in the different provinces which may have a different provision, except where specifically indicated.

VI. Appendixes

The relevant sections of the CAMA on the derivative action, the oppression remedy, the personal remedies and the investigation powers of the Corporate Affairs Commission are attached herewith as Appendix A, while the sections on the British oppression remedy as contained in the British *Companies Act* 1985 are also attached as appendix B.

Additionally, a table of comparison of the derivative action in Nigeria, Canada and under the British common law is attached as Appendix C, and a similar comparison of the oppression remedy is also attached as Appendix D.

CHAPTER 1

CORPORATIONS LAW AND CONTEMPORARY LEGAL THEORY

I. Introduction

The later half of the twentieth century may remain the busiest period in the life of jurisprudence.[1] Legal theory is at an age to "question everything." Numerous but sometimes indistinguishable schools of legal thought contest for dominance, be they old or new, rich or poor.[2] Today, in place of consensus on craftsmanship that dominated the positivist landscape in the 1960s, there now flourishes schools and movements of legal thought which display an intellectually challenging and exciting variety then unimaginable.[3] Indeed, jurisprudence today has gone beyond the "indeterminate major premises" of the realist group and the more scientific "Parento efficiency" and "Kaldor Hicks" analysis of the Law and Economics movement to semiotics and even the psychoanalytical diagnosis of the neurotic foundations for social order. The boundaries keep expanding.

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[1] Jurisprudence here refers to the "generalized form of jurisprudence" which is, roughly put, "the study of general theoretical questions about the nature of laws and legal systems, about the relationship of law to justice and morality and about the social [political, economic, anthropological, literary etc] nature of law" see M.D.A. Freeman, ed., *Lloyd's Introduction to Jurisprudence*, 6th ed. (London: Sweet & Maxwell, 1994) at 4.

[2] These schools use different linguistic and methodological approaches in their analysis. The American Realist Group, the Critical Legal Studies Group and the Feminist Legal Criticism (identified as groups here to accommodate differences in their writings), have presented the toughest linguistic and methodological approach to legal theorising. Critical Legal Studies use internal criticism of existing theories, to unveil the social, political, and historical origin of the theories, locate the defects, and reconstruct the theories with a relational approach. See A. Hunt, "The Critique of Law: What is 'critical' about Critical Legal Theory? " in P. Fitzpatrick and A. Hunt eds., *Critical Legal Studies* (Oxford: Basil Blackwell, 1987) 5 at 13-18, R. M. Unger, *The Critical Legal Studies Movement* (Cambridge: Harvard University Press, 1983). The Feminist Group pursues a self consciously critical stance towards the existing order. See K. Bartlett, "Feminist Legal Methods" (1989) 103 Harv. L.R 829. Bartlett affirms a feminist practical reasoning using "imaginative integrations and reconciliations", and, by asking the woman question, abstracts the relevant from the irrelevant with a "standpoint epistemology"(at 837-848). It is also argued that the Feminist Group has no fixed methodology but use a full range of methods. See C.A. Littleton, "Feminist Jurisprudence: The Difference Method Makes" (1988/89) 41 Stan. L. Rev. 751 at 763-771.

[3] See M. Galanter and M.A. Edward, " Introduction: The Path of The Law Ands" [1997] Wisconsin Law Rev. No 3, 375 at 375. See also H.C. Alan, " Crits and Crickets: A Deconstructive Spin (Or Was It A Googly) in R.F. Devlin, ed., *Canadian Perspectives on Legal Theory* (Toronto: Emond Montgomery, 1991) 181.

In the same direction, legal discourse on the conceptual foundations of corporations law has also been tested from the different locations and stands of these schools. Unfortunately, inflexibility in the ideological focus of the various schools constrains an expansive evaluation of corporations and their proper role in modern society.

Historically, the analysis of corporations in legal theory has been long standing. While the early theories battled with the definition and nature of the corporate concept, the new theories look more at the corporate structure, activities and goals.[4] The importance of a theoretical framework in the complex and technical area of corporations law is well summed up by William T. Allen:

> fields of commercial law, . . . appear or are more technical, more narrowly "legal". In such fields, legal problems may seem less pregnant with potentialities and answers may seem, and thankfully sometimes are, less controversial. It is easy in such fields to lose sight of . . . the contestable philosophical or political presuppositions that lie at their foundations, buried beneath the legal superstructure. Corporation law is such a field.[5]

Professor Richard Bauman also expressed similar feelings that even without crisis or mismanagement, "each new corporate strategy or practice requires lawyers to evaluate that practice in the light of the ideological setting of the law."[6] Several questions arise from this proposition: must corporate strategy and practice be examined in the light of any single ideological setting? Which comes first? Is it the new corporate strategy and practice that lead to corporate law ideology or do theories and ideologies create the way for new corporate law strategies and practice?

---

[4] The rise in theoretical work on corporations law in Canada is still higher than Nigeria. This may be due to the general turn of the legal academy to theoretical expositions as a "strategic response to diffuse ideological pressure" according to F.C. DeCoste, "Taking a Stand: Theory in the Canadian Legal Academy" Book Review of R. F. Devlin, *Canadian Perspective on Legal Theory* (1991) 29 Alta L. Rev. 941 at 966.

[5] W. T. Allen, "Contracts and Communities in Corporation Law" (1993) 50 Wash Lee L. Rev. 1395 at 1395.

[6] See R. Bauman, "Liberalism and Canadian Corporate Law" in R. Devlin, *supra* note 3, 75 at 76.

This chapter will examine the diverse intellectual and theoretical formulations of corporate law theory and corporations law itself.[7] It would of course be impossible to summarise all that has been written or said by the various schools on corporations law in this chapter. However, Part II and III of this chapter identify the focal points in the approaches to corporations law taken by the following groups: the Grant and Fiction Theorists; the Natural and Group Personality Theorists; Classical Liberalism; Law and Economics; the Corporate Social Responsibility Group and Radical Critiques, including Feminism and Critical Legal Studies; Post Modernism and Post-Pragramatic approaches to corporations law. Part IV analyses the place of corporations law in the jurisprudence of economic development. The chapter concludes, in Part V, that an ideologically neo-pragmatic, and methodologically ecletic approach to corporate law is better suited for the advancement of economic development.

The purpose of the theoretical analysis in this chapter is to prepare the background for the contextual analysis of shareholders' remedies in the subsequent chapters. Taking the position that theories of corporations law are constructs from which policies could be derived, the chapter tries to identify the theory that is better suited to the socio-political and cultural environment, and economic needs of developing countries like Nigeria.

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[7] There have been evaluations of these "legitimating" functions of corporate law theory. Detailed and interesting analyses include: J. W. Hurst, *The Legitimacy of the Business Corporation in the Law of the United States 1780-1970* (Charlottesville: University Press of Virginia, 1970); D. Millon, "Theories of the Corporation" [1990] Duke L.J. 201, and M.J. Horwitz, "*Santa Clara* Revisited: The Development of Corporate Theory" (1985/86) 88 W. Va. L. Rev. 173.

II: Early Theories

The early theories of the corporation unsuccessfully adumbrated the nature of the corporation and its relationship to government. The kinds of questions informing 19th century and early 20th century debate were: "What, then, is the corporate entity? Is it real or imaginary? Is it natural or artificial? Is it 'created by the state,' or does it spring into existence spontaneously? Is it a person or is it not?"[8] This approach was heavily criticized for its definitive form and the extra legal conceptions including psychology, politics, metaphysics and theological overtones that influenced its theorising.[9] Such matters were impossible to resolve. As H.L.A. Hart pronounced in 1953 "[i]t is said by many that the juristic controversy over the nature of corporate personality is dead. If so we have a corpse and the opportunity to learn from its anatomy."[10]

This inquiring is still important because it forms the bedrock of corporations law. It touches on such questions as corporate social responsibility as well as the criminal and the tortious culpability of corporations. As Michael Metzger puts it,

> the answers we accept, even if only tentatively, *are* important because our notions

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[8] See A.W. Machen, Jnr., "Corporate Personality" (1910-11) 24 Harvard L. R. 253 at 257- 258.

[9] See H.L.A. Hart, *Definition & Theory in Jurisprudence* (Oxford: Clarendon Press, 1953) at 17-27. See also J. Dewey, "The Historic Background of Corporate Legal Personality" (1925/26) 35 Yale L. J. 655 at 655-662. Dewey traces the formulation of the Concession theory to the rise of the national state against congregations and organisations of feudal state with the tendency to treat all minor organisations as conjurations and conspiracies except as they derived all their powers from an express grant of supreme powers.

[10] *Ibid.* at 17.

> about the nature of corporations must inevitably shape our positions on crucial questions relating to corporate social responsibility and the most effective means of exerting social control over corporations.[11]

a. Grant or Concession and the Fiction Theories

Under early theorising, the corporation is conceptualised as an artificial person, a fiction that only exists in law for juristic purposes.[12] The theory conceives the corporation only "as an artificial being, invisible, intangible and existing only in contemplation of law."[13] Even though the theory gave considerable acceptance of and recognition to the entity, it failed to account for the complexity of the corporate structure and organisation and its relationship to the state.[14]

The corollary to the Fiction theory, the Concession theory, justified the juristic status of the corporation and provided a basis for its close supervision and control by the state.[15] Advocates of the concession theory argue that since the corporation was created by the state, the privilege of incorporation should not simply be for the incorporators' benefit only but must also be employed to further the public good.[16] According to David Millon, the "idea of the corporation as an artificial creature of the state provided the theoretical basis for a body of corporate law that explicitly addressed the relationship between corporate activity and public welfare."[17] The development of the *ultra vires* rule, early prohibition of ownership of stocks and holding companies and restrictions on business of corporations he said, are considered relics of the effects of the concession theory on corporate jurisprudence.

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[11] See M. B. Metzger and D. R. Dalton, "Seeing the Elephant: An Organizational Perspective on Corporate Moral Agency" (1995/96) 33 Am.Bus.L. J. 489 at 490. Footnotes omitted.

[12] For detailed analysis of the fiction theory, see C.T. Carr, *The General Principles of the Law of Corporations* (Cambridge: University Press, 1905) at 160-163, J. Dewey, *supra* note 9 at 665-666 and F.Pollock, "Has the Common Law Received the Fiction Theory of Corporations?" (1911) 27 LQR 219.

[13] See *Dartmouth College* v. *Woodward* (1819) 4 Wheat.518 at 638 per Chief Justice Marshall of the U S Supreme Court.

[14] See E.W.Orts, "The Complexity and Legitimacy of Corporate Law" (1993) 50 Wash & Lee L. Rev. 1565 at 1571-1572.

[15] See J. Dewey, *supra* note 9 at 666-667. See also, C.T. Carr, *supra* note 12 at 164.

[16] This proposition made the concession theory popular. But, in addition, other social and political reasons also contributed to its acceptance. First, the capital strength of the corporation was seen as a potential threat to the balance of economic and political powers. Second, there were suspicions of favoritism and fraud in the grant of charter and monopolistic powers to some early corporations. Such social and political reasons created public uneasiness with the corporation and contributed to the call for governmental supervision. See, C.T. Carr, *supra*

b. Natural Entity and Group Personality Theories

The growth of incorporation by registration as opposed to Charter brought a new reflection to corporate theory. It evolved an argument competing with the concession theory, namely, that the corporation is not the creation of state but of private initiative. This theory considers the corporation as a natural way of doing business. Accordingly, the corporation was not properly regarded as being imaginary or fictitious but real; it was not artificial but natural; it was only recognised and not created by the state.[18]

It is argued that the reduced scope of the *ultra vires* doctrine and the removal of several limitations on the powers of the corporation to trade outside state territorial boundaries as in the United States were practical reflections of this theory's influence.[19]

The real entity theory has been criticized as both "metaphorical," "approximate," and "technical" because it overstresses the essence of corporate personality. Even though the corporation may be real enough for social, political and commercial purposes, its legal

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note 12 at 164-173.

[17] See D. Millon, *supra* note 7 at 201.

[18] See A. W. Machen Jnr., *supra* note 8 at 261-262. See also W.M. Geldart, "Legal Personality" (1911) 27 LQR 90 at 93.

[19] See M.J. Horwitz, *supra* note 7 at 186-207.

personality is only a creation of law.[20]

Another theoretical formulation on the nature of the corporation is that the corporation is a symbol or "aggregate of shareholders", that is, nothing more than the individual property rights of the members of the corporation. This theory did not gain a strong foothold particularly because its assumption of ownership of a corporation like a piece of property is incompatible with the concept of corporate personality.

The aggregate theory of the corporation has been reconstituted, perhaps more successfully, by the Law and Economics Movement which regards the corporation as a "nexus of contract" amongst the shareholders, managers, employees and investors by implicit and explicit agreement. The value of this conception is discussed below.

III. Modern Theories

Modern discourse on corporations law has moved away from enquires as to the nature of the corporate entity to more social and scientific formulations as to the struture, role, aims and political legitimacy of the corporation.

a. Classical Liberalism and the Economic Analysis of Corporate Law

The transition of corporate law theory shows a shift from inquiry as to the nature of the corporation to an intense focus on social scientific ideas and methods of inquiries into the institutional structure and goals of the corporation. The economic analysis of corporations law for the past 35years has had the most vibrant impact and has offered a wide analysis of corporations law particularly in America.[21] The Economic Analysis of Law in its ideological background is considered a resurgence of Classical Liberalism and its ideals of man's prehistoric sphere of autonomy and freedom not derived from the state or government. These ideals were largely based on the works of John Locke, Adam Smith, Jeremy Bentham, John Stuart Mill, Herbert Spenser and Milton Friedman.

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[20] See C. T. Carr, *supra* note 12 at 182.

Classical Liberalism, generally formulated, projects a free market in which labour and capital can freely interact to achieve what they want on the basis of mutually agreeable terms. This free market principle forms the value or goal of shareholders' wealth maximization which they advocate.[22] Although Classical Liberalism favours wealth maximization, it claims that this is not its major value. Properly seen, freedom and liberty are the major values; wealth maximization is only a means to those values.[23]

The Economic Analysis of Law approaches corporations law more scientifically. In scope and ideology, the school is not uniform.[24] On one end of the spectrum, there are the conservatives like Judge Richard Posner. On the other end, there are liberals like Bruce Ackerman and Richard Eipstein. Notwithstanding their differences, these two groups converge through positive methodology and structural emphasis on microeconomic principles.[25]

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[21] See W. T. Allen, *supra* note 5 at 1399. The influence of the economic analysis of law is now also widely noticed in Canada and Britain both in support and in criticism. See C. A. Riley, "Understanding and Regulating the Corporation" (1995) 58 Mod.L.Rev. 591. See also B. R. Cheffins, *Company Law Theory, Structure and Operations* (Oxford: Clarendon Press,1997) which examines English Company Law with economic analysis; see also F. H. Buckley, *Corporations, Principles and Policies* (Toronto: Emond Montgomery, 1995).

[22] For a comprehensive analysis of Classical Liberalism and Corporations Law see J. R. Danley, *The Role of Modern Corporation in a Free Society* (London: University of Notre Dame Press, 1994), N. P. Barry, *On Classical Liberalism and Libertarianism* (Houndmill: Macmillan Press, 1989). See also R. B. Malloy "Adam Smith and the Modern Discourse of Law and Economics" in R. P. Malloy and J. Evensky, eds., *Adam Smith and the Philosophy of Law and Economics* (Dordrecht: Kluwer Academic Publishers, 1994) 113.

[23] See R. P. Malloy "Is Law and Economics Moral?--Humanistic Economics and Classical Liberal Critique of Posner's Economic Analysis" in R. P. Malloy and J. Evensky, *ibid.* at 156-157.

[24] *Ibid.* at 153.

In a radical revolt against the early theories on the nature of the corporation, the economic school conceives of the corporation simply as a "nexus of contract," a voluntary business organisation among shareholders, lenders, employees, and managers, who by explicit and implicit bargains, become involved in corporate affairs voluntarily and interact on the basis of reciprocal expectations and behaviour.[26] Easterbrook and Fischel identify the corporate contract as encompassing the articles of incorporation, finance agreements, by-laws, and the "presets" or "fall back" terms specified by law.[27]

This contract paradigm is seen to reshape as mere business tools all the known features of the corporation, including corporate personality, and all the features that flow from it: limited liability, perpetual succession, transferability of shares and management structure.[28]

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[25] The Economic Analysis of Law School uses basic economic principles premised on the scarcity of resources to satisfy human wants which are insatiable. Human beings make choices that would maximize their values. In evaluating alternatives, (in an explicit market) the forces of demand, supply and prices of goods and services are considered. Individuals are driven by self-interest to maximize their values by choosing the best alternative. In allocation of resources, or in the exchange of goods and services, efficiency is reached when no one will be left worse off (Parento efficiency) or if someone will be left worse off but the gainer could potentially compensate the loser and still be better off than before the exchange (Kalder Hicks efficiency). These are the tools employed by the school in analysing corporate law concepts. This is not intended to be a comprehensive and articulate explanation of the economic tools but only intended to enable us comprehend their exposition on corporations law based on these principles. See R. Posner, *Economic Analysis of Law*, 3rd ed. (Boston: Little Brown,1986), A.I. Ogus and C.G. Veljanovski eds., *Readings in the Economics of Law and Regulation (* Oxford: Clarendon Press, 1984) for a comprehensive analysis.

[26] See B.R. Cheffins, *supra* note 21 at 31-46. See also F.H. Easterbrook and D.R. Fischel, "The Corporate Contract" in R. Romano, *Foundations of Corporate Law* (New York: Oxford University Press, 1993) at101-107.

[27] *Ibid.* at 104.

[28] See F.H Easterbrook and D. Fischel, "Limited liability and the Corporation" in R. Romano, *supra* note 26, 65 at 65-70. They argue that limited liability is desirable because it shifts some of the risks of business failure to creditors and reduces the cost of operating the company.

According to the conservative economic school, shareholders are in a unique contractual relationship with the company because they have no opportunity to renegotiate their contract. In addition, among all parties that invest in the corporation in one way or the other, the shareholders are located at the end of the queue on liquidation. Therefore, shareholders deserve higher protection than the other participating parties to the corporate contract such as employees and managers.[29] More importantly, the efficiency doctrine behind exchange and resource allocation of the school demands that shareholders, having supplied the capital, have to maximize their value. Shareholders' wealth maximization becomes the primary focus of the law and economics school.[30]

Concomitantly and not surprisingly, conservatives like Richard Posner believe in efficiency of the market in resource allocation and advocate deregulation of corporations law. In short, the law is to be merely enabling. This means that a prime objective of corporations law is permitting parties to the corporate contract to choose freely the terms that are to bind them.[31]

The debate on the enabling status of corporations law has become tense, particularly in America, between the advocates of the economic analysis of law and others who argue that lowering the restrictions on corporations by some states in America has lead to "a race to the bottom" in American corporate jurisprudence.[32] In a recent economic analytical study, albeit a controversial one, Roberta Romano reveals that the federal structure of the United States of America which allows each state to enact its corporations law creates competition amongst the corporations law of the different states. Incorporators seek to incorporate their businesses in the state where the corporations law is more convenient for their business activities. This, according to her, creates a "market for corporate charter." The increase in the number of corporations that register in Delaware compared to other states is regarded as the result of the efficiency of the American corporate market mechanism.[33]

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[29] See O.E. Williamson, "Corporate Governance" in R. Romano. *supra* note 26, 157 at 157 -162.

[30] The separation of management from ownership is also another argument for shareholder protection because it creates a risk for the shareholders of mismanagement and of directors enriching themselves (referred to as agency cost). See M.C. Jensen and W.H. Meckling, "Theory of the Firm: Managerial Behavior, Agency Costs, and Ownership Structure" in R. Romano, *supra* note 26, 7 at 10.

[31] The liberals within this school argue that due to imperfections in the market such as inadequate information, there is need for some mandatory laws. See M.A. Eisenberg "The Structure of Corporation Law" (1989) 89 Columbia L.R 1461 at 1463-1485. But see R. Romano, "Answering The Wrong Question: The Tenuous Case for Mandatory Corporate Laws" (1989) 89 Columbia L.R. 1599 at 1603-1613.

The conservative economic analyst rejects any views that the corporation may have social responsibilities because this would be contrary to the doctrine of efficiency and shareholders' profit maximization. That is, the imposition of social responsibility on the corporation would have adverse economic implications for the corporation and hence on shareholders.[34]

The economic analysis of corporations law no doubt sounds both interesting and highly intellectual and has the academic support of highly distinguished scholars. However, the classical liberal theory on which it is partly founded and its own ideological and methodological foundations are impeachable as both unreal and misdirected and this even by the liberals within the economics school. Classical liberalism on its own is considered arbitrary and archaic particularly for its non intervention policy.[35] Furthermore, it can be contended that the classical liberal view has even failed to secure the shareholders' interest: a "laissez faire" policy renders shareholders impotent because shareholders' democracy in reality is replaced with management oligarchy.[36]

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[32] The state of Delaware has the highest numbers of corporations in part because corporations registered in other states often move to reincorporate in Delaware. It was argued by William Cary in 1974 that Delaware depends heavily on revenue and franchise from incorporation and was lowering its corporate code to attract companies to the State. See W. Carry, "Federalism and Corporate Law: Reflections Upon Delaware" (1974) 83 Yale L.J. 663 at 665-66 and 668-72, D.R. Fischel "The "Race to the Bottom" Revisited, Reflections on Recent Developments in Delaware Corporations Law" (1982)Nw. U.L.Rev. 913. This view has been heavily criticized on the following basis: even though Delaware law may be more favourable to managers, if such managers do not take shareholders interest into consideration, the shares of the company will fall, leading to a higher cost of capital, closure of the company, replacement by takeover, and job loss by the managers. It is argued that this threat of job loss invariably push managers to maximize shareholders' wealth. See R. Romano, *The Genius of American Corporate Law* (Washington, D.C: A.E.I. Press, 1993) at 4-31.

[33] Romano praises this arrangement as the genius of American corporate law because it allows for the creation of innovative corporations law that quickly responds to changes in the market factors. See R. Romano, *ibid.* at 48-50 and 148-149.

[34] See R. Posner, *supra* note 25 at 419.

The structural foundations of the economic analysis of law is also questioned in the context of ethical values. Its sole value -- wealth maximization -- is considered unacceptable as a political and economic philosophy. "Is wealth a value?" as R.M. Dworkin has succinctly asked.[37] The shareholders' wealth maximizing goal of the conservative economic analysis of law makes their propositions unattractive because it ignores all other social and political considerations that shape society and law making.

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[35] See A.C. Hutchinson and A. Petter "Private Rights/Public Wrongs: The Liberal Lie of the Charter" (1988) 38 UTLJ 278 at 286-292. Here, the authors argue that the government has responsibility not only to change the *status quo* but also to maintain it.

[36] This view was also raised by Professor Akanki of the University of Lagos in a paper titled "Company Directors' Responsibility" delivered at a seminar entitled *The Role of Company Secretary in Corporate Management* at the Federal Palace Hotel, Lagos, Nigeria, 25 October, 1994. The most authoritative work on this is A. Bearle and G. Means *The Modern Corporation and Private Property*, rev.ed. (New York: Harcourt, Brace and World,1968) which revealed in a study of American corporations in 1936 that corporate management is in the hands of professional managers. This seperation of management and ownership and the ensuing agency cost has been argued as a basis for statutory control of directors and managers' powers.

[37] See R.M. Dworkin, "Is Wealth a Value?" (1980) 9 J. Legal Stud. 191 at 205-207. Dworkin argues that wealth is only a component and instrument of social value. This makes the wealth maximization aim of the economic analysis of law incomplete. Although some scholars of the economic analysis of law school deny a normative goal, ironically, their positive analysis of corporations law show efficiency to wealth maximization or wealth maximization to efficiency as the only goal of corporations law. For this debate, See G.Calabresi, *The New Economic Analysis of Law, Scholarship, Sophistry or Self Indulgence?* Macabre Lectures in Jurisprudence 1981, (London: Oxford University Press, 1981). Calabresi argues too that what is wealth depends on what people want, and what people want depends on the allocation of starting points. Therefore, according to him, the wealth maximization goal is mere sophistry. See for a counter debate, R.A. Posner, "Utilitarianism, Economics, and Legal Theory" (1979) 8 J. Legal Stud. 103 at 107-111.

Apart from this apparently primitive goal of wealth maximization, the contractual paradigm is also very unreliable. In very big organisations, due to sale of shares, investors are constantly changing and so it can not be rightly said that they bargained with the other parties of the "corporate contract". In addition, managers' duties are not specified by the corporate contract because of the predominance of discretionary powers.[38] Furthermore, corporate "managers" as parties to the contract do not necessarily have equal bargaining power to secure terms for their position.[39]

With or without disembodied contract theory, the economic analysis of corporations law is defective. Its reliance on the market mechanism as the regulatory formula for corporate activities is flawed by both structural and operational limitations. Corporate activities involve variables other than prices and fungible inputs.[40] Market forces are imperfect and do not provide a reliable or timely regime of accountability.

Indeed, the abuses of managerial power cannot be properly regulated by the market. First, as Eisenberg argues, for top managers, the market is limited, therefore, they need not worry about the market for managers as a check against their excesses. Similarly, the takeover effects canvassed as another check is illusory because it cannot be economically justified to end unfair dealings. There is no guarantee that the target corporation will actually be the subject of a successful bid nor that the cost and practical delay associated with takeover will discipline the inefficiency of managers. Second, such a threat cannot prevent managers from filling their bags on their way out. And third, defences by managers against takeovers have been strengthened by the courts thereby reducing the threat of any market discipline against the inefficiency of managers.[41]

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[38] See W.H. Simon, "Contract Versus Politics in Corporation Doctrine" in D. Kairys, ed., *The Politics of Law, A Progressive Critique*, rev. ed. (New York: Pantheon Books, 1990) 387 at 391-392.

[39] See V. Brudney, "Corporate Governance, Agency Costs and the Rhetoric of Contract" (1985) 85 Columbia L.R.1403 at 1421-1426.

[40] *Ibid.* at 1430-1442.

The above critique is important. In developing countries and some developed countries, corporate markets are less advanced due to: market imperfections, poor organisational strategies, the absence of good information systems and the relative infrequency of corporate takeovers. The strength of market forces to regulate managerial abuses in such circumstances is unconvincing.[42] In the same way, the argument that poor management will reduce the price of corporate stock is also academic. This is because managerial abuses are not likely to have an immediate effect on prices.

Therefore, the conservative proposal for an enabling statutory regime for corporations is unrealistic. This conclusion is supported by the liberals within the group who argue that there is need for government intervention through corporations law because of the problems of imperfect market, problems of proper judgement and "negative externalities" which arise "when people who are not parties to a consumption or production decision are adversely affected by the decision."[43] Some liberals also believe that dictates of community responsibilities including moral and ethical values, require governmental supervision of corporations.[44]

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[41] *Ibid.* at 1417, particularly, footnote 37.

[42] In Nigeria for instance, takeovers are not a frequent market event.

[43] See B.F. Cheffins, *supra* note 21 at 126-140. See also M. Kahan. "Securities Laws and the Social Costs of "Inaccurate" Stock Prices" (1992) 41 Duke L. J. 977 at 988-1005.

b. Corporate Social Responsibility

Should corporations be socially responsible? Should corporations law contain mandatory provisions to make corporations responsible to constituencies other than the shareholders? Different theoretical arguments have been advanced for and against.[45] For example, the exclusion of considerations outside the shareholders' profit maximization value which dominated the English corporate jurisprudence from the 19th century is reflected in the words of Justice Bowen:

> The law does not say that there are to be no cakes and ale, but there are to be no cakes and ale except such as are required for the benefit of the company. . . charity has no business to sit at boards of directors *qua* charity. There is, however, a kind of charitable dealing which is for the interest of those who practice it, and to that extent and in that garb. . .charity may sit at the board, but for no other purpose.[46]

This quotation perfectly represents the spirit of corporations law in England which has been followed by most commonwealth countries. Corporations have no duty other than to pursue their own commercial interest.[47]

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[44] Such is the argument of the Communitarians, Humanomics and adherents of corporate social responsibility considered below.

[45] Detailed examination of the protection of non shareholders' constituencies was carried out in a seminar organised by the University of Toronto on 24th and 25th April 1992. The full text of the papers presented is published in (1993) 43 UTLJ.

[46] See *Hutton* v. *West Cork Railway* Co (1883), 23 Ch.D 654 at 673. (CA). Similar words were pronounced in the US case of *Dodge* v. *Ford Motors Co*. 204 Mich. 459 at 507 (1919). " A business corporation is organised primarily for the profit of the stockholders. The powers of the directors are to be employed for that end. The discretion of directors is to be exercised in the choice of means to attain that end...."

[47] As Judge Richard Posner of the American Court of Appeal, might have said:

> No one else sits at the board room of directors except those divinely committed to the shareholders' wealth maximization. Shareholders' wealth maximization is the only way that leads to efficiency because either no one would be left worse off or the gains of shareholders would be enough to compensate those that may be injured by its activities without putting the company in a worse situation.

Judge Posner did not say this exactly, but the quotation represents the nature and goal of the corporation in economic language using for instance, the Parento and Kaldor- Hicks efficiency analysis of the Law and Economics school.

The opposing view that corporations have a responsibility to the society in general was originally associated with the concession theory. Today, this debate has become heightened by the growth of large corporations and globalization of their activities.

Corporate social responsibility has been widened to cover duties to employees, the communities where the corporation operate, the state of domicile of the corporation and even the environment.[48]

Primary adherents of the concession theory and its later sympathisers support the imposition of duties on the corporation in favour of non-shareholder constituencies as consideration for the privilege of incorporation and corporate personality conferred on it by the state. Some supporters of the natural entity theory also propose that the corporation, like any natural person engaged in business, must obey and respond to the attitude of public and business opinion.[49] The problem with this opinion is that corporate social responsibility in this sense would be nothing more than rules of personal ethics and benevolence. It would not provide a basis for a mandatory system of legal rules for the implementation of the responsibility.[50]

More convincing economic, social and and political considerations have been advanced in support of corporate social responsibility. The communitarians and humanomics group of the economics school have imported social concerns into their economic analysis. They support the view that corporations ought to consider other social and communal interests in their structure and activities outside the wealth maximization goal. The communitarians show a willingness to confront practically the harmful effects of corporate activities on non-shareholder constituencies because they are influenced by the imperfections in the market. In addition, they believe in the broad social effects of contractual relationships and other obligations that arise by virtue of membership of a shared community.[51] Accordingly, the communitarians agree that insistence on the market efficiency for the sake of individual liberty ignores those civic obligations that flow from the social aspect of human existence[52]

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[48] See A. Guobadia, "Defining Corporate Social Responsibility for Nigeria Oil and Gas Sector" (1991) 3African J. Int. & Comp. L. 472 at 473-476.

[49] See E.M. Dodd, "For Whom are Corporate Managers Trustees" (1931/32) Harvard L.Rev. 1145 at 1146-1161.

[50] This should be compared to the nonfeasance rule in the law of Tort. See J.B. Ames, "Law and Morals" (1908) 22 Harvard L.Rev. 97 at 100-101.

The Humanomics on the other hand stress corporate social responsibility at a psychological level. Their alternative political and economic corporate model is based on the needs of people, planet earth and the ecological process.[53] The Humanomics school therefore seeks to redirect the goal of corporations from efficiency and profit maximization alone to include concern for human psychological and material needs, and self actualisation. This, in turn, would enable employees to achieve self growth and operate within the limits of the planet.[54] Reduced to corporations law, the Communitarians and Humanomics advocate a stakeholder regime. The only noticeable difference between the Communitarians and Humanomics is that the Humanomics emphasize in particular, the protection of the ecological process.

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[51] See D. Millon, "Communitarians, Contractarians and the Crisis in Corporate Law" (1993) 50 Wash &Lee L.R.1373 at 1378-1383, and W.T.Allen, "Contract and Communities in Corporation Law" (1993) 50 Wash & Lee L.R. 1395 at 1401-1403.

[52] See D. Millon, *ibid.*

[53] See L.D. Solomon, " On the Frontier of Capitalism: Implementation of Humanomics by Modern Publicly Held Corporations: A Critical Assessment " (1993) 50 Wash and Lee Law Rev. 1625 at 1629.

[54] *Ibid.* at 1635-1636. See also L.D. Solomon and K.J. Collins, " Humanistic Economics: A New Model for the Corporate Social Responsibility Debate" (1986/87) 12 J. Corp. Law 331 at 337.

Unlike the Humanomics and Communitarians, other scholars advocate corporate social responsibility without a strong ideological basis. Fairness, equity, morality, the general values and goals of society and the adverse economic and social effects of corporate activities form the basis of their call for corporate social responsibility.[55]

The different ideological basis for an enlarged role of corporations in modern society by a broad concern for other communal and social interests considerations are very persuasive. However, the various ideological schools are not helpful in solving the more practical concern of the type of legislative frame-work which would make corporations socially responsible, and how to draw the balance between the competing interests. Only a very few suggestions have been made, ranging from advocating a non shareholders' derivative action in equity[56] and provisions in corporate legislation for the validation of directors actions taken in the interest of non-shareholders, to making the interest of shareholders secondary to non shareholders in desired cases.[57] Other recommendations include a two tier board and the provisions for the right of employees to share in the profit of the corporation.[58]

Though the humanomic view is very attractive, corporations law may not be able to accommodate the protection of the environment matters into its structure given jurisdictional and scientific problems attending environmental protection. Even though it may be accepted that corporations should protect the enviroment where they operate, such matters would be better handled by other areas of law.

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[55] It may be argued that this on its own is an ideology but some of the scholars are unwilling to pitch this particular tent, realising the problems of ideological projections. William T. Allen, asking that Corporations Law mediate between the wealth maximizing value and fairness said " I offer no theory to explain that mediation . . ." See W.T.Allen, ***supra*** note 5 at 1405.

[56] See W.S.W. Leung, "The Inadequacy of Shareholder Primacy: A Proposed Corporate Regime that Recognises Non-shareholder Interests" (1997) 30 Columbia J.L.& Soc. Prob. 587 at 624.

[57] See A. Guobadia, ***supra*** note 48 at 482.

[58] See N. Martin-Kaye, "The Theoretical Basis of Modern Company Law" [1976] Jour. Bus. Law 235 at 242-243.

c. Radical Critiques: Marxism, Critical Legal Studies and Feminism

i. Marxism

Karl Marx did not offer a direct theory of corporations law.[59] However, his theory of state and social order forms the basis of some post-modern and radical critiques of corporations law.

Karl Marx's historical materialism is well known for its attack on the capitalist economic system as a form of exploitation and domination of workers. Law generally and corporations law in particular are seen as instruments for the perpetration of this exploitation.[60] Marx challenged the degradation and unfair treatment of workers, linking it to the separation of direct producers from means of production.[61] Historical materialism was, in fact, a prophesy of a revolution against the capitalist exploitation and a change to the economic foundation and the superstructure.[62]

The Marxist critique of corporations law centres on two approaches. Neo- Marxist scholars evaluate the history and development of corporations law in the continuing expectation of the final collapse of capitalism. For example, in the 1930s, the Marxist belief was that corporations were largely financed and controlled by banks and financial institutions. This external control was expected to create irrationality that would destroy the corporation and this was expected to be the last phase of capitalism in America. But by 1966, Paul Baranand and Paul Sweezy had asserted that most corporations in America were self financed and no longer dependent on banks and finance houses.[63] A second manifestation of the Neo-Marxist critique of corporations law is to use marxist philosophy to refine corporate concepts and principles. This manifestation of Neo-Marxism finds particularly fertile ground through the Critical Legal Studies Movement. Neo-Marxian theories are also reflected in some of the works of Feminist scholars and Post-Modern Critiques of corporations law.

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[59] It is even argued that Karl Marx did not propose any theory of law. See J. Fudge, "Marx's Theory of History and a Marxist Analysis of Law" in R.F. Devlin, *supra* note 3, 151 at 151. The argument canvassed is that Marx offered a theory of history to provide a basis for historical explanations. This chapter will not go into these arguments.

[60] See R.W.M. Dais, *Jurisprudence*, 5th ed. (London: Butterworths, 1985) at 396. See also, M.D.A. Freeman, *supra* note 1 at 837.

[61] See J. Fudge, *supra* note 59 at 154-155.

[62] According to Richard Bauman, this was an event that Marx anxiously anticipated. See R.W. Bauman, *supra* note 6, 75 at 85.

ii. Critical Legal Studies

The Critical Legal Studies (hereinafter "CLS"), though often described as "a radical form of leftist critique"[64] has a varied approach and methodology.[65] Its unifying force, however, is the exploration of the ways in which law works to buttress and support oppression, inegalitarianism, and in some cases to develop radical alternatives.

Though CLS has said little about corporations law specifically, the neo-Marxian faction of the group offers a critique based on Marxist ideas. In sum, the corporation is regarded as the underpinning mechanism for the reproduction of capitalist society.[66] Corporations law is regarded as the reification and depersonalisation of capitalist social relations in the mode of production. Christopher Stanley, for example, argues that with the development of the corporation, the individual has become alienated because the corporate entity emerges as a thing in itself, an autonomous form of capital.[67] The prevalent doctrine and theoretical analysis of legal personality as established in *Salomon* v. *Salomon*[68] is further 'deconstructed'. He argues that legal personality was formulated to facilitate and disguise the inegalitarian actuality of corporate relations in the mode of production.[69]

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[63] See P. Baran and P. Sweezy, *Monopoly Capital* (New York: Monthly Review Press, 1966) cited by R. Bauman, *supra* note 6 at 85. See also R. Fitch and M. Oppenheimer, "Who Rules the Corporation" Part 1, 11 and 1V, (1970) Socialist Vol. 4 at 73, Vol. 5 at 30. Here, the views of Baran and Sweezy were questioned. This latest study did not support increased outside control although it did not conclude on its effects on corporate capitalism.

[64] See S.K. O'Byrne, "Legal Criticism as Storytelling" (1991) 23 Ottawa L. Rev. 487 at 489.The history of the school is traced to the conference on Critical Legal Studies in Madison, Wisconsin, USA in 1970. See S. O'Byrne at 489. See also P. FitzPatrick and A. Hunt, *supra* note 1 at 1.

[65] The variety in style, focus and methodology of the CLS is examined in detail by A.Hunt in Fitzpatrick and Hunt, *supra* note 1 at 13-16.

Other CLS scholars have also carried out historical studies to show how corporations law supports and perpetuates capitalist exploitation. Paddy Ireland, Ian Grigg-Spall and Dave Kelly also contend that the conception of the corporation as a legal person separate from the shareholders was motivated by the development of shares as a separate form of property, a form of "fictitious capital" developed by the capitalist to separate capital from labour.[70]

This critical historical analysis has been further explored through an examination of the prevalent conflicts in corporations law in relation to shareholder supremacy, creditors, employee protection and the interest of the community. It rejects the debate concerning these conflicts as misdirected because it is premised on the idea of the corporation as a separate legal entity, an invention made to serve the capitalist interest. Furthermore, because the corporation is a product of capitalism, the debate in support of corporate social responsibility is only "a better or less degenerate" form of capitalism and hardly retrievable.[71] To the Marxist faction of the CLS therefore, corporations law as it is now is totally unacceptable. As put by Paddy Ireland,

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[66] See C. Stanley, "Corporate Personality and Capitalist Relations: A Critical Analysis of the Artifice of Company Law" (1988) 19 Cambrian L. Rev. 97 at 97.

[67] *Ibid.* at 99-103 and 106-108

[68] [1897] A.C. 22 (H.L.)

[69] See C. Stanley, *supra* note 66 and following.

[70] See "The Conceptual Foundations of Modern Company Law" (1987) 14 Jour. Law & Soc. 149 at 158-162. Writers like Christopher Stanley express dissatisfaction that there has not been much written by members of the CLS on corporations law.

> The company is, and will always be, the personification of industrial capital and, as such, subject to the imperatives of profitability and accumulation. . . . No amount of fiddling with company law- whether it is with the fiduciary duties of directors or with the structure and composition of company boards- can change this.[72]

However, some other members of the CLS do not reject corporations law in totality. They only call for a reconstruction of corporations law to include other values such as protection of non-shareholders' interest.[73]

The central defect of CLS' analysis of corporations law is in its tendency to generalize and its reluctance to offer alternatives to the *status quo*. The Marxist faction, for example, rejects corporations law simply because it is founded on capitalism. As well, neither the Marxist nor communitarian versions of CLS provide detailed analysis of the revised concept that would replace the present corporate structure. This is the "paradox of engagement" and the "paradox of postponement" identified by Richard Bauman in his analysis of the CLS Movement.[74] This makes the movement less than positioned to suggest alternative corporate forms.

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[71] See P. Ireland, "Corporate Governance, Stakeholding, and the Company: Towards a Less Degenerate Capitalism" (1996) 23 Jour. L. & Soc. 287 at 295-314.

[72] *Ibid.* at 304.

[73] See W.H. Simon, *supra* note 38. This is in line with the different faces of CLS.

[74] See R. Bauman "The Communitarian Vision of Critical Legal Studies" in A. Hutchinson and L. Green, eds., *Law and the Community: The End of Individualism* (Toronto: Carswell, 1989).

iii. Feminist Critique of Corporations Law

As part of corporations law's struggle with ideological crisis, feminist philosophies, feminist sociology and feminist history have also offered reflections, and recently, radical ones, on the underlying basis of corporate concepts and structure.

Ideologically, feminist jurisprudence seeks to analyse the contribution of law in constructing, maintaining, reinforcing and perpetrating male dominance and discrimination against women,[75] and the various ways and strategies by which these can be eradicated. On the political level, feminist critique seeks to promote equality between the sexes and accordingly, gender is the focal point of its analysis.[76] Like the law and economics school, there are varieties within the feminist group.[77]

Early liberal feminist thought in relation to corporations considered discrimination at the work place.[78] Direct attempts at a critique of corporations law by the Liberal Feminists fault the corporation for its bureaucracy and hierarchical organisational nature.[79] From such analysis, the feminist critique has developed more resounding insight into corporations law. Unlike the classical liberal analysis, such feminists have offered an alternative corporate model.[80] The feminist corporate model rejects limited liability and big corporations for entrepreneurship. It is argued that, even though limited liability has economic advantages, it does not convey an ethic of care. As an alternative, a limited risk company with adequate insurance against risk or entrepreneurship is offered. Such feminists prefer the small, sympathetically managed business because it can fully incorporate feminist values including the relationship women have with children and other loved ones. They propose a corporate model that is less hierarchical and one which fosters care and responsibility extending to lenders, landlords and others in contact with it.[81]

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[75] See M. D. A. Freeman, *supra* note 1 at 1025-1033.

[76] For detailed analysis of feminist jurisprudence, see D. L. Rhode, "Feminist Critical Theories" (1990) 42 Stan. L. Rev. 617, A.C. Scales, "The Emergence of Feminist Jurisprudence: An Essay" (1985/86) 95 Yale L.J. 1373, R. West, "Jurisprudence and Gender" (1988) 55 Un. Chicago L. Rev. 1, and C.A. Littleton, "Reconstructing Sexual Equality" (1987) 75 Cal.L.Rev.1274.

[77] For detailed analysis of feminist critique of corporations law, see B.U. Ahunwan, "The Corporation as a Woman: Reflections on the Feminist and other Interdisciplinary Formulations for a Corporate Law Ideology" a paper presented at a conference on *Law's Interchanging Territories* at the University of British Columbia on April 29 and 30, 1998. [Unpublished] at 5-10. But briefly, in context and methodology, Feminist Jurisprudence has varieties. For reasons of expediency, the feminist approaches are divided into schools: Liberal Feminism focuses on constraints and organisational structures that create unequal rights for women from a formal perspective. Socialist Feminism attacks market-based capitalism, while Relational feminism provides a critique derived from set values based on shared experiences. Other groups include analytical feminism, -- tending towards unabashed self referential analysis -- and radical feminism. The Radical Feminist looks at fragmentation and bureaucracy that perpetrates patriarchal values. See T.A. Gabaldon, "The Lemonade Stand:Feminist and Other Reflections on the Limited Liability of Corporate Shareholders" (1992) 45 Vand. L.Rev 1386 at 1420-1421.

[78] See A.E.Decker, "Women in Corporate Law: Rewriting the Rules." (1996) 4 Am. U. J. Gender & L. 511 on discrimination by Wall Street law firms.

Feminism also criticizes the structural framework of corporations law because it excludes an ethic of care and refuses to recognise the symbolic nature of our existence. It is argued that this has resulted in fragmentation and alienation between personal morality and the productive use of property.[82] The feminist theory therefore professes corporate caring and nurturing in areas of employee relations, job security and decision making. The objective is to expand the role of women as care givers of society into corporate moral goals. This analysis is in short, a "womanised" theory of corporate social responsibility. The ideals it canvasses, such as the duty of care and love for employees, investors and other people in contact with the corporation, even though laudable, may be very difficult to enforce by a corporations law statute.[83]

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[79] This approach rejects corporate theories as simply stories that seek to explain and defend bureaucratic organisations. The great debate on shareholders' protection and the protecting mechanisms -- such as principles of agency, trust and fiduciary law -- are regarded as stories of instrumental rationality made only to project bureaucratic legitimation. See G.E. Frug, "The Idea of Bureaucracy in American Law" (1983) 97 Harvard L.R. Pt. 2 1277. The Socialist feminists have also developed a critique similar to the Marxist faction of the CLS -- a total rejection of capitalist ideology. See Gabaldon, *supra* note 77 at 1419.

[80] See T.A. Gabaldon, *supra* note 77 at 1448. See also K.A. Lahey & S.W. Salter, "Corporate Law in Legal Theory and Legal Scholarship: From Classicism to Feminism" (1985) 23 Osgoode Hall L.J. 543 at 569-572, and R. Cohen, "Feminist Thought and Corporate Law: It's Time to Find our Way up from the Bottom (Line)" (1984) 2 Am. U. J.Gender & L. 1.

[81] See T.A. Gabaldon, *supra* note 77 at 1428- 1429.

[82] See R. Cohen, *supra* note 80 at 11.

d. Post-modernism, Pragmatism and Corporations Law

To understand the post-modern and Pramatic approach in relation to corporations law, take a hypothetical example of the Corporations Act of the State of Utopia. In summary, the Act provides for a corporation of one or more persons but not more than three persons. The corporation must not have assets more than $20million. The directors of any corporation registered in the State of Utopia are mandated to run the corporation sympathetically, and show duties of love and care to the employees and all those in contact with the corporation. The Act further makes detailed provisions for the protection of the community and the environment where the corporation operates. The Act also provides that the directors must run the corporation solely for the interest of the shareholders' profit maximization and must shun any other interest in conflict with this goal. Shareholders are also empowered to adopt any structure they see fit to pursue their profit maximization. Finally, all the provisions of the

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[83] Insurance against liability and investors' empowerment by facilitating communication between shareholders, and the use of professional directors, which Theresa Gabaldon recommended, is a more feasible way of improving corporate care. However, this still poses practical difficulties. Although Gabaldon tried to provide acceptable solutions, she overlooked the costs of insurance. For both small and big companies, the overall cost of insurance would affect not only shareholders, but also the employees and consumers for whose benefit the recommendations were made. Second, risk reduction insurance may also make directors more reckless, though of course, premiums would increase with every claim. Invariably, both suggestions return corporations law to the endless circle of striking the right balance.

Act are applicable only where there are no express and contrary agreement by the shareholders.[84]

As the above paragraph seeks to illustrate, the Corporations Law of Utopia is meaningless. It shows clearly distinguishable but incompatible values. In the mix, unfortunately, the values still stand alone and the Act loses its meaning. What then is Post-Modernism?

Historically, Post-Modernism is traced to a revolution in the Arts against reality, hierarchy and boundaries in style, codes and other traditions.[85] Today, as part of law's expanding territories, post modernism has become a common word in legal speech and thought.

Ideologically however, it is still difficult to say exactly what post modernism stands for. It is argued that, like most other schools, post modernism represents different stands and strands of legal thought.[86]

However, a clearly identifiable tenet and one which commands a measure of uniformity within the school is the assumption that different paradigms and systems of discourse with their distinctive value axioms can co-exist.[87] This registers the idea that, in society, there is not a single rationality but a plurality of rationalities. Therefore, knowledge and legal discourse should be simultaneously multiple with different representations, modes, values, images and discourses. This plurality is based on the post-modern belief in the inconclusiveness of knowledge.

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[84] This hypothetical Utopian Corporations Legislation tries to reflect the blend of the ideals of Liberalism, The Economics School, Feminism, CLS, Communitarians, Humanomics and Corporate Social Responsibility to reflect the pluralism of post-modernist thought. It may be an oversimplification and incorrect. The essence is to show the practical difficulties of the collage of discourses where each discourse is to retain its ideal. It is also to show

the problems of choosing a particular ideal and still remain a multiple discourse.

[85] See J.F. Lyotard, "Answering the Question: What is Postmodernism" in M.D.A. Freeman, *supra* note 1, 1159 at 1159-1163.

[86] See J. Wicke, "PostModern Identity and the Legal Subject" in M.D.A. Freeman, *supra* note 1, 1166 at 1167. Wicke, highlighting the equivocal conceptual status and uncertain provenance of post modernism alleges that there are 31 flavours of post modernism with variables and often "conflictual set of interlocutors."

This metatheoretical purism of post-modernism sounds interesting and has been subscribed to by some scholars of the CLS and Feminist schools.[88] Outside of that, the question of the proper value by which the different discourses should be judged makes post-modernism highly contigent or uncertain. Each of the different discourses of law has distinct values. In a post-modern union, would each separate value be reflected as shown in the Utopian corporations law? Or how does a central value evolve? In choosing the central value what would be the standard to judge the different discourses?

Post-modern scholars are divided as to value judgement. [89] Some scholars like Jean-Francois Lyotard propose that the role of the Post-modern scholar is only to describe and discuss the discourses and not to prescribe.[90] Peter Murphy has suggested more substantive criteria for judgement: "values of belonging (community), participation (citizenship), inner worldly asceticism (work), understanding (humanistic scholarship) and autonomy (originality)."[91]

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[87] See P. Murphy, "Post modern Perspectives and Justice" in D. Patterson, ed., *Post modernism and Law* (The International Library of Essays in Law and Legal theory Schools 14), (New York: New York University Press, 1994) 3 at 4.

[88] See for example, M. J. Frug, "Rescuing Impossibility Doctrine: A Post modern Feminist Analysis of Contract Law" in M.D.A. Freeman, *supra* note 1, 1214. This is a blend of psychoanalysis, linguistics and philosophy in the deconstruction of Contract Law. An analysis of feminist attitude to post modernism was also carried out by Dennis Patterson. He finds three groupings: one embraces post modernism, a second remains with modern assumption of truth, rationality and fixed ideals while a third remain in the middle of the two. See D. Patterson, "Postmodernism/Feminism/Law" in D. Patterson, *ibid.* 305 at 330- 340. For the similarities between CLS and Post modernism, see A. Hunt, "The Big Fear: Law Confronts Post modernism" (1990) 35 McGill L. J 507.

[89] Richard Rorty, for example, subscribes to this anti-foundational views of post-modernism but still appears to maitain a liberal political philosophy. See P. Murphy, *supra* note 87. In that regard, his views also tends towards neo-pragmatism. See *infra*.

Although post-modern scholars have yet to examine corporations law in the context of their plurality of discourses and disregard for any trumping values and ethics, the tangible result of such analysis is inconceivable.[92]

In practical reality, each of the discourses (or most of them) suggests a different corporate model. How can the post modern structure build a single model from all the discourses? If legal theory is simply aesthetics and vocabulary without a degree of worth that makes it more desirable, then, corporations law in legal theory would have no direction.

Legal Pragmatism on the other hand is also anti foundational and free of "theory guilt."[93] It believes in practical judgement constituted by, and constructed in the dynamics of social practice.[94] Neo-Pragmatism like the old American Realist School, shuns abstract principles. Instead, it attends to the actual workings of the law in "context" or in a particular social setting. In part, it prefers to consider the consequences of rules and principles in action and not abstract theoretical formulations.[95] Three basic elements of pragmatism are articulated by Richard Posner in the following way:

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[90] This approach is criticized as a form of interminable discourse. It is even argued that Lyotard's ideas is a form of enlightement modernism and not post modernism. See P. Murphy, *supra* note 87 at 5-6.

[91] See P. Murphy, *supra* note 87 at 7.

[92] From the history of the modern corporation, different values and social, political and economic factors have influenced the various corporate legislative regimes. Similarly, the present discourses on the nature, structure and role of corporations and corporations law are reflections of these trends and alternative ideas. Therefore, to formulate a corporate law ideology based simultaneously on all these discourses judged only by the aesthetics and vocabulary of each discourse cannot confront the practical problems and controversies in corporations law.

[93] Pragmatism, whether of the 'Neo' or 'Paleo' varieties is seen not as a distinct philosophical movement but as Richard Posner puts it , it is "an umbrella term for diverse tendencies in philosophical thought. See R.A. Posner, "What has Pragmatism to offer Law" (1990) 63 S. Cal. L. Rev. 1653 at 1653.

[94] See C. West, "The Limits of Neopragmatism" (1990) 63 South Cal. L. Rev 1747 at 1748.

> The first is a distrust of metaphysical entities ("reality," "truth," "nature," etc) viewed as warrants for certitude whether in epistemology, ethics, or politics. The second is an insistence that propositions be tested by their consequences, by the difference they make - and if they make none, set aside. The third is an insistence on judging our projects, whether scientific, ethical, political, or legal, by their conformity to social or other human needs rather than to "objective," "impersonal" criteria.[96]

This practical approach of Neo-Pragmatism is criticized as both a manifestation of complacence and an end to ideology. This criticism is directed at its lack of identity and political substance. Even though it may be useful to examine legal issues in context, the term "context" is subjective. Several factors may influence the context from which a particular issue could be examined. This therefore leaves a gap and an ever open door for ideologies and foundations to crop in: Richard Posner's autonomy and market concepts and their practical effects have successfully become neo-pragmatist; feminism has also provided a context from which the practical realities of law is examined and criticized as to how it perpetrates patriarchy and oppression of women. And so on. This is because Neo-Pragmatism, as put by Richard Posner, only clears the underbush, it does not plant the forest.[97]

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[95] *Ibid.* See also J. W. Singer, "Property and Coercion in Federal Indian Law: The Conflict between Critical and Complacent Pragmatism" (1990) 63 S.Cal. L. Rev.1822 at 1822-1826, and R.Rorty, "The Banality of Pragmatism and Poetry of Justice." (1990) 63 S.Cal.L. Rev. 1811 at 1815.

[96] See R. Posner, *supra* note 93 at 1660-1661.

[97] See R. Posner, *supra* note 93 at 1670. But it is also argued that this is an advantage for Neo-pragmatism. In contrast to complacence, it could become a good method of critical analysis. See M.J. Matsuda, " Pragmatism Modified and the False Consciousness Problem" (1990) 63 S. Cal. L. Rev. 1763. She states that pragmatism is attractive to subordinated people because by their personal experiences, they expose problems and raise consciousness. That even though there may be many different groups without agreement on specific issues, the categories count in calling attention to the social facts. Similarly, even the possibility of a particular group raising false consciousness is considered advantageous. She argues that such so called false consciousness could become a critical self consciousness. For reconciliation of Judge Posner's Neo Pragmatic stance and his Law and

Another significant problem in pragmatism is identified in Cornel West's assertion that "the pragmatist tradition is widely associated with a distrust of theory that curtails its ability to fully grasp the operations of power within the personal, social and historical context of human activities"[98] In short, the pragmatist tradition limits itself to the "pedagogical" and "dialogical" and assumes that "vast disparities in resources, enormous polarizations in perceptions, or intense conflicts of interests can be overcome by means of proper education and civil conversation."[99] In the formulation of a corporations law ideology from a pragmatic position, these matters becomes very relevant. From which context should the practical realities of corporations law be judged: shareholders' protection, lenders and trade investors' protection, employees' protection or the protection of the community?

The different writers that appear to be pragmatic or neo-pragmatic in corporate law theory do not clearly resolve these kinds of matters[100] In fact, some of these scholars indicate their non affiliation and disregard for classification of ideological schools. Instead, the writers simply call for a balancing of the various interest considerations.[101]

IV. Corporations Law and the Jurisprudence of Economic Development

From the development of the corporation from the guild system of trade, the

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Economics ideology, see P. F. Lake, "Posner's Pragmatist Jurisprudence" (1994) 73 Nebraska L.Rev. 545.

[98] See, C. West *supra* note 94 at 1748.

[99] *Ibid.* at 1748. That is, the pragmatist is vulnerable to the charge of being naive, although Cornel West does not use this term.

[100] See W. T. Allen, *supra* note 5 at 1405, L. Johnson, "New Approaches to Corporations Law" (1993) 50 Wash & Lee L. Rev. 1713 at 1723 where Johnson stated that the "new approaches to corporate law [should] not operate wholly at the level of theory."

[101] See L. Johnson, *ibid.* at 1719-1723.

extended partnership and finally the joint stock company, corporations law has evolved principles and practices to regulate the different problems that crop up.[102] The making of corporations law ideology has therefore been illusory. As put by David Millon:

> history should remind us that there is nothing inevitable about orthodoxy. Ideas about what corporations are, and the normative implications that follow from those ideas, have changed radically over time . . . . Confronted with important political challenges, theories of the corporation have always been fundamentally indeterminate.[103]

Arguments on the nature of the corporation, the theoretical background of the legal personality, and their impact on corporations law, still rage on. This is because corporate legislative provisions and judicial analysis do not in any way support a single ideological position. In Canada, it has been argued, whatever the merits of the various theories of corporate legal personality, that the *Canada Business Corporation Act*[104] (hereinafter referred to as "CBCA") has embraced the fiction theory.[105] This view, it is argued, is supported by the creation of the one person corporation and the powers of an existing corporation to incorporate another under the CBCA.[106] Also offered in support is the fact that the CBCA corporation comes into existence without apparently having any shareholder[107] and that the CBCA gives directors the powers to revive a dissolved corporation.[108]

No matter how appealing this argument may appear, section 15 of the CBCA confers on the corporation all the powers of a natural person. This, of course, contradicts the fiction theory. Although this provision is dismissed as a mere expediency,[109] there is further support for the real entity theory in decisions of the Canadian courts that have held that corporations are entitled to certain constitutional rights under the *Canadian Charter of Rights and Freedoms.*[110] Cases such as *RJR-MacDonald Inc* v. *Canada,*[111] *Hunter* v. *Southam Inc.*,[112] *R* v. *741290 Ontario Inc.*,[113] are in support of the real entity theory.[114] If the corporation is a fiction, abstract and existing only in contemplation of law, then discussions of its moral and criminal culpability in these cases could not be justified. In the same way, the classical and neo-classical approach and the economic analysis of corporations law cannot account for the totality of corporate law concepts. The agency principle and the fiduciary duties of directors are considered to have been developed to protect shareholders who are their primary focus. But these ideologies cannot provide convincing reasons why the law gives legal personality to the "nexus of contract" it calls the corporation. Furthermore, the nexus of contract paradigm cannot provide a complete analysis for the basis for the tortious and criminal culpability of corporations.

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[102] On the history on the modern corporation, see P.L. Davies, ed., *Gower's Principles of Modern Company Law*, 6th ed. (London: Sweet & Maxwell, 1997) at 3-52.

[103] See D. Millon, *supra* note 7 at 262.

[104] R.S.C. 1985, c. C-44.

[105] See J.S. Ziegel, R.T. Daniels, and J.G. MacIntosh eds. *Cases and Materials on Partnership and Canadian Business Corporations*, 3rd. ed. Vol. 1 (Toronto: Carswell, 1994) at 139.

[106] CBCA s. 5(2).

[107] CBCA s. 6, 8, and Forms 1 and 2.

[108] CBCA s. 209.

In addition, corporations law today is moving away from a singular shareholders' protection focus. While some modern corporations law protect shareholders' interest, other values are now taken into consideration. Employees and other stake-holders are now considered by some corporate legislation although some of these provisions are still faced with practical difficulties.[115]

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[109] See Ziegel, *supra* note 105.

[110] Part 1 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act* 1982 (U.K.), 1982, c. 11.

[111] [1995] 3 S.C.R 199 (S.C.)

[112] [1984] 2 S.C.R 145 (S.C)

[113] (1991) 2 O.R. (3d) 336.

[114] For corporations' protection under the *Canadian Charter of Rights and Freedoms*, see B. Welling, W.B. Rayner and C. Jordan, *Canadian Corporate Law: Cases, Notes and Materials* (Toronto: Butterworths, 1996) at 26 - 30.

Influential Nigerian law reformers have taken the position that Nigerian corporations law should reflect the state of Nigeria's social and economic development and the aspirations of continuing economic development. According to Professor Orojo, on the underlying basis of the Nigerian company law reform of 1990:

> The objective of the reform exercise . . . was to evolve a comprehensive body of legal principles and rules governing companies and **suitable for the circumstances of the country**. These rules should facilitate business activities in the country, while recognising the international implications of Company law; **protect the interest of the investors, the public and the nation as a whole**. Towards these ends, the Commission . . . applied the Nigerian circumstances, interest needs and experiences as the yardstick . . . [116]

This perspective is reflected in the Nigerian corporations law, the *Companies And*

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[115] Some states in the United States of American have adopted this stake holder legislation. Such states include Indiana, Pennsyslavia among others. The Indiana Code for example provides in s 23-1-35-1(d) "A director may in considering the best interest of a corporation consider the effects of any action on shareholders, employees, suppliers and other customers of the corporation, and any other factor the directors may consider pertinent" and in s 23-1-35-1(f) "In making such determination, directors are not required to consider the effects of a proposed corporate action on any particular group or interest as a dominant or controlling factor." For full discussion of these recent developments in the US corporate legislation, see W.S.W.Leung, *supra* note 58. Canada has not adopted this stakeholders legislation but provisions such as s. 114 of the *Alberta Business Corporations Act* SA 1981 c B-15 providing for the personal liability of directors for six months unpaid salaries of employees on winding up is instructive, so also is s. 117(4) which permits the directors, when determining whether a particular transaction is in the best interests of the corporation, to give special consideration to the interests of employees or creditors if he or she is elected or appointed by such group.

[116] See J.O.Orojo, "An Overview of the Companies and Allied Matters Decree 1990" in E. O. Akanki, ed., *Essays On Company Law* (Lagos: University of Lagos Press, 1992) 1 at 3. Emphasis mine. The deregulation of the economies of the former Soviet Union and other Eastern European countries recently presented the opportunity for Corporate Law experts to carve a Corporations Law from scratch. The practical problems presented reveal the insufficiency of dry theoretical formulations. See B. Black and R. Kraackman, "A Self Enforcing Model of Corporations Law" (1996) 109 Harvard L.R. 1911.

Allied Matters Act[117] (hereinafter referred to as "CAMA"). Though a hybrid of the English, Canadian and other commonwealth systems, local factors are noticeable in its provisions on ownership of companies, management and investors' protection. Such local factors are reflected in the abolition of non voting equity shares,[118] provisions for greater and more effective participation in, and control of the affairs of the corporation by detailed provisions for meetings.[119] Other provisions include enlarged provisions for investors' protection and wide administrative powers given to the Corporate Affairs Commission (the body empowered to administer the CAMA), particularly, the powers to carry out investigations of companies.[120]

The need for localization of corporations law touches on the role of law in economic development. In developing countries, it is asserted that law should be a conscious means of economic development,[121] and accordingly, that law should integrate the cultural, social, economic, institutional and political dimensions to harness the diverse trends and aspirations.[122] Elias formulated that to be able to meet the developmental aspirations of the people, "law and society should be engaged in a continuous dialogue both as to the choice of means and the end in view."[123] He also argued that ideologically, the lawyer for development must be more than just a positivist, or a utilitarian, or a social engineer: he or she must be "something of each".[124]

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[117] Cap.59, Laws Of The Federation Of Nigeria 1990. This legislation is different from previous ones that were simply copied from England in this regard. It tried to reflect the local circumstances.

[118] CAMA s. 116. This provision was influenced by national economic developmental factors. It was argued and accepted that the non voting shares and shares carrying different classes of votes which was allowed by the Companies Act of 1968 was extensively used to frustrate government's objective of giving more control of business to Nigerians. See J.O.Orojo, *Company Law and Practice in Nigeria* 3rd. ed., (Lagos: Mbeyi & Associates, 1992)

[119] CAMA ss. 211-240. The Act provides in addition to the General Meeting and and the Extra- Ordinary General Meeting, a third type of meeting for public companies, the Statutory Meeting which is required to be held six months after incorporation to discus the pre-incorporation transactions.

[120] CAMA ss. 7, 311(2), 314, 157(3)(a) and 315.

[121] See T.O.Elias, *Law in a Developing Society* (Benin City: Ethiope Pub. Corp., 1972) at 5.

[122] See M.L.Marasinghe, "Third World Perspective in Jurisprudence: The Need for a New Approach" in M.L.Marasinghe and W.E. Conklin, eds, *Essays on Third World Perspectives in Jurisprudence* (Singapore: Malayan Law Journal Pte, 1984) at 1.

Elias's jurisprudence of development has sometimes been refered to as the "Third World Perspective on Jurisprudence." It is also discussed by the General Law and Development movement.[125] Essentially, while these scholars canvass the use of law as an instrument of economic and social development, they acknowledge the importance of theory. Seidman, for example, argues that theories form constructs from which developmental policies could be tested and that they are also useful for the critique of laws.[126] Other scholars, however, argue that principles and policies of development need not be related to a body of existing theory because of the fear that such may "impose undue pressure for orthodoxy and perhaps result, paradoxically, in blinding the researcher to important questions."[127] Instead, scholars of law and develoment emphasize that even though theories are useful, they must be tested against "time-and-place", and against specific behaviours of relevant social actors and institutions, and must be informed by experience.[128]

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[123] See T.O. Elias, *supra* note 121 at 141.

[124] *Ibid.* at 140.

[125] For fuller analysis of the third world perspective on jurisprudence, see M.L. Marasinghe and W.E. Conklin, eds. *Essays on Third World Perspective in Jurisprudence*, *supra* note 122. The difference between the third world perspective and the general law of development is that, the general law of development tries to formulate principles and ideologies that include even the western idea of development. Consequently, there are areas of agreement and conflict between scholars of the third world perspective and some scholars of the law and development studies. See M.L. Marasinghe, "Towards a Third World Perspective of Jurisprudence" in M.L. Marasinghe and W.E. Conklin, 395 at 396 - 400.

[126] See A. Seidman and R.B. Seidman, *State and Law in the Development Process: Problem Solving and Institutional Change in the Third World* (New York: St. Martin's Press, 1994) at 57 - 62.

[127] See International Legal Centre, *Law and Development: the Future of Law and Development Research* (Sweden: ILC, 1974) at 55.

Therefore, methodologically, scholars of law and development advocate a "contextual and methodologically eccletic approach." They claim that studies and research on development should "build on existing knowledge where available, and should use any technique of social inquiry, including aspects of the positivist model of social science, as are feasible under the circumstances and useful to the inquiry"[129] This is in line with Elias's proposition, and is also subscribed to by Marasinghe.[130]

V. Conclusion: Corporations Law Theory and Practice; A Neo-Pragmatic Approach

The foregoing analysis has demonstrated that the ideological discource surrounding corporations law is varied, expansive and vulnerable. The author contends -- along with Elias, Marasinghe and others in the development movement -- that evaluations of corporations law with a single ideological standpoint is flawed because corporations law represent not a single interest but multiple interests and considerations. This is the case not only for developed countries but also for developing countries where corporations law is further complicated by undesirable factors of underdevelopment.

A development approach to corporations law critiques and formulates corporate doctrines, structure and goals from a wide range of ideological perspectives. It seeks to represent multiple stake-holders and properly balance competing interests while promoting the goal of reducing poverty and other concomitants.[131]

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[128] See Seidman, *supra* note 126 at 62-67.

[129] See International Legal Centre, *supra* note 127 at 50.

[130] *Supra*, note 121 at 395.

Following such a developmental approach, how might corporations law theory be advanced in light of the normative positions taken by the schools of thought surveyed in this chapter? The positive economic analysis of corporations law is no doubt a good tool for the evaluation of corporate concepts. It would become even more useful to the assessment and reform of corporate law in developing countries such as Nigeria, if it reconstitutes its focus to include other constituencies outside shareholders, such as employees and the relevant community. On the other hand, the radical critiques discussed earlier would not help corporations law theorising to the extent that they are entirely opposed to incremental reform. Furthermore, Feminism and CLS critiques are still too generalised. Their citiques are illuminating but can lack utility from a developmental perspective when they are at their most adamant. And Post-Modernism provides an arresting theoretical stance but lacks a purposeful value other than aesthetics, except to the extent that it cautions against ideological arrogance.

It can be seen from this brief analysis that, taken separately, none of the ideological formulations would form a theory of corporations law which would tangibly or immediately assist in the project of corporations law in the developing world but they are capable of providing some illumination on the subject.

The author is of the view that a neo-pragmatic approach is well positioned to assist in the analysis of corporations law. This is because recourse to wide range of ideological perspectives would enable scholars to comprehensively analyse and critique corporate law principles and concepts. This is a richer, more reliable and productive approach in the context of development than one single, unitary ideological stance could provide.

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[131] See S. Rees, "Company Law's Role in Economic Development: the French Approach" (1994) 68 A.L.J. 777 at 777-779.

Corporations law is a by-product of a larger system of laws, norms, goals, aspirations and institutions that structure the political, social and economic substratum. In a developing country plauged by hunger, poor information and communication, ecological problems and other terrible social and economic problems, the objective of reducing poverty points to the need for building a strong economy which could attract and hold foreign investment without defeating the values of national autonomy. This reality and ambition, in turn, contributes to the form, intent and direction of corporations law[132] advanced in this thesis. A good theory of corporations law is a formulation that considers and contextualizes the activities of all parties directly and indirectly concerned with the corporate structure in accordance with such goals and unashamedly draws from a wide range of perspectives

In short, to power the neo-pragmatic theoretical engine, the author advocates eccleticism animated by developmental values. This approach can handily relate corporations law to the larger system of laws, norms, goals, aspirations and institutions that structure the political, social and economic substratum. By such approach, the economic developmental needs of a country would be identified and, it is hoped advanced.

This thesis, in examination of shareholders' remedies in Nigeria in comparison to Canada, adopts the approach recited just above. It analyses and critiques shareholders' remedies from a wide range of ideological positions as are necessary for the diverse goal of economic development. Additionally, the thesis tests the law, theories and practice of shareholders' remedies against the socio-economic, political and cultural setting in Nigeria in order to identify specific problems and adduce solutions befitting the environment.

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[132] This distinguishes my position for a practical and wide theoretical approach from the "ideological" Neo-Pragmatism.

CHAPTER 2

THE SOCIAL, POLITICAL AND ECONOMIC ENVIRONMENT AND SHAREHOLDERS' REMEDIES: THE NIGERIAN CONTEXT

I. Introduction

Nigeria has experienced different stages of legal, economic and political growth and development. Although it has similarities to Britain and Canada, it also has importantly unique features which impact on the structure of the corporation generally and on shareholders' remedies specifically.

In keeping with the analysis of corporate law theories in the preceding chapter, this chapter will endeavour to locate Nigerian shareholders' remedies in the broader context. This is because peculiar circumstances, including the need for economic development, the relative inexperience of the Nigerian judiciary with corporate law concepts, the slowness with which civil actions are able to proceed to trial and the relative unreliability of the Nigerian information system, to name a few examples, create a distinctiveness that should be considered in analysis of shareholders' remedies.

Some of the matters to be explored in this chapter include the socio-political problems such as absence or inefficiency of basic infrastructure, cultural and religious traits and the ownership structure of the Nigerian corporation. They all contribute to the environment in which shareholders' remedies operate. Concomitantly, with the stance advocated in Chapter One, this chapter will seek to localize Nigerian shareholders' remedies both as a means of identifying problems in the law and as a vehicle for formulating how shareholders in Nigeria might find improved remedies when their interests are disregarded by directors and officers.

This chapter is divided into several parts. Part II examines the Nigerian corporations law from a comparative perspective in order to illustrate the similarities and differences with Canadian corporate law. Part III explores shareholders' remedies in the Nigerian context while Part IV analyses how the environmental factors create special problems for the Nigerian shareholder. Finally, Part V concludes by relating how these local environmental factors impact on corporate law theorising which was discussed in Chapter One.

II. Corporations Law of Nigeria and Canada: An Historical and Comparative Analysis

The corporations law of Nigeria and Canada have a historical connection. Both countries inherited the British law of business organizations as developed at English common law and through statutory reforms. For example, the legal framework of the corporation in Nigeria and Canada (as well as in England and the United States of America) is similar in organizational and hierarchical structure. The main parties directly involved with the corporate vehicle are the shareholders, the directors, the managers and officers, and the employees. The interrelationship among the parties is primarily dictated by statute and case law.

In addition, both countries exhibit a similar pattern of corporate law development. The Canadian corporate law reform of 1975 altered its law from the British memorandum and articles of association model[1] to the American type division of powers model. Nigeria, on the other hand, in its corporate law reform of 1990, retained the memorandum and articles of association model[2] but also imported some of the features of the Canadian corporations law, and in particular, its provisions for the statutory derivative action and the oppression remedy.[3] Notwithstanding these differences in their corporate models, both countries rely on similar legal terminology, and have a legal system with many features in common. Consequently, it is particularly fruitful to compare the Nigerian and Canadian law of shareholders' remedies.[4] Indeed, as stated by Professor Akanki, Dean of the Faculty of Law of the University of Lagos, Nigeria:

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[1] On the characteristics of the two models of corporate law, and the history of Canadian corporate law, see B. Welling, *Corporate Law in Canada, the Governing Principles*, 2nd ed. (Toronto: Butterworths, 1991) at 36- 72. On the history of Nigerian company law, see J.O.Orojo, *Company Law and Practice in Nigeria* (3ed.), (Lagos: Mbeyi and Associates, 1992) at 16 - 28. Note however, that in Canada, both the federal government and the provincial governments have powers to create and regulate corporations. See *Bonaza Creek Gold Mining Co.* v. *The King*, [1916] 1 A.C. 566 (H.L.), and B.Welling at 3-10. In Nigeria on the other hand, the federal government has exclusive authority to legislate on the creation and regulation of companies for all the states of the federation.

> [i]n the interpretation of the new deal for company minorities in Nigeria it is Canada, more than any where else, that Nigerian courts must look for comparison and, or, persuasive precedents. The two provisions [on oppression and unfair prejudice and derivative remedies] are not only similar but also the most comprehensive. . . . Besides, Canada has about fifteen years experience to borrow from.[5]

In short, a comparison of the Canadian and Nigerian law of shareholders' remedies can form an important basis for the critical analysis of the Nigerian law from an academic perspective. It also fosters a better understanding of the Nigerian law which would be an aid

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See *Constitution of the Federal Republic of Nigeria* 1979 s. 4(2) & (3) and item 31, part 1 of the second schedule to the constitution. See also B.O. Nwabueze, *Federalism in Nigeria under the Presidential Constitution* (London: Sweet & Maxwell, 1983) at 39 - 58.

[2] Under this model, the memorandum and articles of association forms a contract between the company and its members and between the members *inter se*. See *Companies and Allied Matters Act* cap. 59, Laws of the Federation of Nigeria, 1990, (hereinafter 'CAMA'), s. 41.

[3] The Nigerian provisions on the 'oppression and unfair prejudice remedy' and the 'derivative action' followed the trend of most commonwealth countries. Austrialia and New Zealand for example have similar provisions on the oppression remedy. See Law Commission (Britain), *Shareholder Remedies, A Consultation Paper* (Consultation Paper No 142 (London: Stationery office, 1996) (hereinafter "Consultation Paper No 142") at 261 - 274.

[4] On the required features, basis and methodology for comparative study of corporate law, see P.De Cruz, *A Modern Approach to Comparative Law* (Deventer: Kluwer, 1993) at 4-5, and 211 -238. See also P.De Cruz, *Comparative Law in a Changing World* (London: Cavendish, 1995) at 337-348.

[5] See "Protection of the Minority in Companies" in E.O. Akanki ed. *Essays on Company Law* (Lagos: University of Lagos Press, 1992) 276 at 296.

to judges and law reformers.

Similarities between Nigerian and Canadian corporate law should not be overemphasized. The real workings of the relationship between corporate stakeholders from one country to another are greatly affected by economic, political and the sociological factors.[6] As well, the content, strength and weakness of the Nigerian shareholders' remedies are better appreciated and judged by a contextual examination.

III. Remedies in Context

a. The Political Economy of Nigeria

The study of Nigeria's political economy[7] involves more speculation than accurate arithmetical data. For an inside observer, it is easy to view the structure and trend of the economy, but it is difficult to say with exact figures the structure and distribution of the economy. As stated by no less authority than Alhaji A. Ahmed, then Governor of Central Bank of Nigeria:

> there is a dearth of accurate, reliable and up-to-date statistics in the country except in few cases of monetary, credit and financial data published by the Central Bank. There are also statistical technical problems such as biased, inconsistent non-comparable and sometimes duplicated statistics.[8]

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[6] Although this is an uneasy generalization, detailed analysis of the Nigerian social, economic and political environment and its impact on shareholders' remedies (in comparison to the Canadian), which is intended here, will seek to illustrate this.

[7] The term political economy here refers to the economics of production, exchange and distribution of resources within the context of the politics and societies of Nigeria; the nature and distribution of the wealth of Nigeria in relation to the structure of the corporation as influenced by the Nigerian socio-economic and political factors. See Nigeria Economic Society, eds., *Nigerian Economy: A Political Economy Approach* (London: Longman, 1986) at 1-10.

[8] See "The Current State of the Nigerian Economy and its Challenges to Policy Makers" in (1985) Central Bank of Nigeria, Economic and Financial Review Vol. 23 (No 3) 12 at 13-14. Another difficulty in getting accurate statistical data on the ownership structure of Nigerian companies, is the problem of 'fronting.' It is a common practice for some Nigerians and even foreign individuals to have large investments in companies in the names of

Economists describe Nigeria as a mixed economy.[9] This portrays the equal participation of the government - both the federal government and state governments- with private individuals (in form of corporate bodies and sole proprietors) in the ownership of the means of production.[10] This is in the form of direct ownership of commercial, industrial enterprises and public utilities. Presently, most of the public utilities such as electricity, telecommunication, railway, and the ports are still wholly and directly owned by the government.[11]

On the other hand, the government also participates with private persons as joint owners of corporations. This runs across all industries. In particular, the government owns

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other people, sometimes even non existant people. See I. Achebe, "The Legal Problems of Indigenisation in Nigeria: A Lesson for Developing Countries." (1989) 12 Hasting Int'l. & Comp. L. Rev. 633. See also *Lasisi* v. *Registrar of Companies*, [1976] 7 S.C. 73 (S.C. Nig) and *Kehinde* v. *Registrar of Companies*, [1979] L.R.N.213(H.C.) where the Registrar of Companies refused to incorporate the companies on the ground that the Nigerian shareholders were only fronting for foreign shareholders.(The courts revised the decision of the Registrar on legal grounds). These cases are discused by G.C. Nnona, in "The Requirements of Company Incorporation in Nigeria Law: An Analysis of Underlying Philosophies" (1995) Africa J.of Int.& Comp.Law 568 at 595 - 602. As a result of the above difficulties, the analysis of the ownership structure of Nigerian companies and the figures stated in this chapter are not based on an empirical study, but on a synthesis of Government publications and expert commentaries.

[9] See A.A. Okarafor and A.E. Nwankwo, "Ownership and Control of Factors of Production in the Nigerian Economy" in The Nigerian Economic Society, *supra* note 7, 111 at 111-122. Although the political and economic reformation in the former socialist countries of the former Soviet Union and the Eastern Europe have tremendously altered the ideology of capitalism and socialism as strong opposing political and economic structures, the terminology is still useful.

[10] The government of Nigeria in 1988 commenced a programme of privatization and commercialization of its corporations and investments. This has not been very successful. The ideology of social progress and wealth distribution has slowed down the exercise. See T.M. Yesufu, *The Nigerian Economy: Growth Without Development* (Benin City: Benin Social Science Series for Africa, 1996) at 338 - 347.

[11] See A. A. Okafor and A.E. Nwankwo, *supra* note 9 at 120-121. Another example given is in the financial sector where the government owed 40% shares in all the formerly foreign owed banks in Nigerian, 20 % being owed by private individuals and 40% by foreign partners. This structure was the result of the indigenisation programme of the Government in the 1970s by which the Government attempted to reduce the foreign control of the Nigerian economy. The *Nigerian Enterprise Promotion Decree* No 4 of 1972, later replaced by the *Nigerian Enterprise Promotion Decree* No 3 of 1977 was enacted to further this objective. Under this law foreign participation in named sectors of the economy was restricted to 40 % and 60 % depending on the sector. The Government bought substantial part of the divestment of the foreign owed companies. For detailed analysis of the legal and economic impact of these decrees, see E.I Kachikwu, *Nigerian Foreign Investment Law and Policy* (Lagos: Mikzek Law Publications, 1988) at 143- 180. Note that this Decree has long been repealed. It was first amended by the *Nigerian Enterprises Promotion (Issue of Non- Voting Equity Shares)* Decree 1987 (Now cap. 304 Laws of the Federation of Nigeria, 1990) and finally by the promulgation of the *Nigerian Investment Promotion Commission* Decree No 16 of 1995.

60 percent of the shares in all the oil production companies in Nigeria.[12]

From the above introduction, it is easy to imagine who the major players of the Nigerian economy are: the government, foreign multinational and indigenous investors. While the foreign multinationals in the oil industries and the government form the majority shareholders, the remaining 'minority shares' are owed by the local investors. Other multinationals in the form of subsidiaries of overseas companies also participate in the manufacturing, commercial and technical industries. Here, they also form the majority shareholders in the companies in which they operate while the local investors comprise the minority shareholders.[13]

Below in this chain of ownership is the general class of local investors who are organised in three forms. They are: the small investors in the multinational corporations and foreign/government owed oil corporations, majority shareholders of middle-sized corporations, and owners and operators of the personally managed private corporations.

Although there are a few institutional investors in the ownership structure of Nigerian corporations, their impact is low and almost unnoticeable. Several factors could be responsible for the relative scarcity of the institutional investor. First, banks under the banking legislation are restricted from holding shares in companies.[14] Second, the instability of the investment climate discourages banks and financial institutions from investing in equity. This also applies to insurance companies. And third, the low level of savings and ineffective organizational set-up may also prevent the pension, housing scheme and mortgage institutions from developing in Nigeria.

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[12] See G. Angaye, "Petroleum and the Political Economy of Nigeria" in The Nigerian Economic Society, *supra* note 7, 50 at 57.

[13] See A. Olukoshi, *Economic Crisis, Structural Adjustment and the Coping Strategies of Manufacturers in Kano, Nigeria* (Discussion Paper presented to the United Nations Research Institute for Social Development) (Geneva: UNRISD, 1996). The author highlights (at 8), that from a survey of manufacturing establishments in Nigeria by the Federal office of Statistics in 1989, foreign capital was more in the fabrication industries - 46.5%, while the other distribution was: private Nigerians, 53.09%, Federal Government, 0.14% and State Governments, 0.52%. But in the knitting mill, the distribution was: foreign capital, 52.47% while Nigerians held 47.72%. Similarly, in a survey of Kano city in the research, of the 289 companies in the survey, the multinational corporations had interest in 48, representing 15.57%.(at 12). See also Statistical Surveys Office, "Foreign Investment in Nigeria in 1989" (1991) Central Bank of Nigeria Economic and Financial Review, Vol.29 (No) 4, 343. Here, the survey shows that the cumulative paid up capital by foreign investors represents 46.8% of the total paid up capital in the industrial, manufacturing, agricultural and commercial sector. Out of this, parent/affiliates of overseas companies account for 87.8% while other individual foreign investors account for 12.2 %.(see page 357 and Table 29.)

The foregoing demostrates the significance of Nigeria's political economy to shareholders' remedies: it, in part, determines the ownership structure of the corporation. The ownership structure in turn, contributes to the efficiency, or otherwise, of the shareholders' remedial network. It limits, for instance, market control as an efficient corrective for managerial incompetence or fraud since shares tend to be in the hands of those who are not likely to sell -- the government and parent companies of foreign multinationals.

In addition, pronounced government participation as part owners also has serious effects on corporate management, control and shareholders' remedies. It is the common practice for the government representation on the board of directors for example, to form alliances with managers and other directors at the expense of minority shareholders.[15] Similarly, the tendency for the government through its representation on the board to influence corporate policies for public needs at the expense of shareholders' profit maximization is also very high.[16]

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[14] See O.Olivide, "A Critical Appraisal of the New Banking Decree in Nigeria" in C.O. Okonkwo, *Contemporary Issues in Nigeria Law* (Lagos: Taiwo Fakoyede, 1992) 148 at 163-164.

[15] As one writer observed, some of the joint ventures by government and private individuals are also used "as avenues for diverting public funds into party/private coffers". See A.A. Akinsanya, "State Strategies Towards Nigerian and Foreign Business" in I. W. Zartman, ed., *The Political Economy of Nigeria*, (New York: Praeger, 1983) 145 at 169.

[16] See A.A. Okarafor and A.E. Nwankwo, *supra* note 9 at 121.

b. Infrastructure and Socio-Political Ills

As part of the features of its economic and political underdevelopment, Nigeria lacks inefficient infrastructure. The roads are not very good, the communication system is also poor, and a high percentage of the population have no telephones and fax. Access to the Internet is still unaffordable. In addition, there is an instable electricity supply while a vast part of the country has no electricity supply at all.[17] The overall effect is that communication is slow and unreliable. Consequently, a high level of information asymmentary is created that greatly impairs the efficiency of business transactions.[18]

Furthermore, other social ills accompany Nigerian underdevelopment. Corruption, ethnic and tribal feelings and discrimination have become cankerworms that have bedevilled vast aspects of the economy, particularly the public service.[19] Without exaggerating the level of corruption, one can still conclude that, at any level, it must reduce the level of efficiency of the bureaucratic institutions and government regulatory establishments, as well as lower compliance with law and order. As stated by Alhaji Ahmed, while still the Governor of

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[17] In a 1995/96 statistical survey of Nigeria, it is estimated that about 57% of Nigerian households have no electricity. See Table 52 - Percentage Distribution of Household By Type of Electricity Supply, in Federal Office of Statistics, *Annual Abstract of Statistics* 1997 Ed. (Abuja: Fed. Office of Statistics, 1997) at 74.

[18] Professor Akanki describes the impact of this on corporate management as follows: "lack of effective communication complicates the situation even further in Nigeria. Sometimes, meetings are held before notices are received." See "Company Directors' Responsibility", a paper delivered at a seminar on *The Role of The Company Secretary in Corporate Management* at the Federal Palace Hotel, Lagos, Nigeria on 24 October, 1994, at 29.[Unpublished.]

[19] Even external observers feel the extent of these ills. See for instance the notes by The *Economist* from a survey of the Nigerian society;

> "peoples deepest loyalty is to the home village and community from which most of them have very recently moved from and with which even the most urban maintain strong personal links. . .other loyalties - to the public service, the private firm, the hospital, whatever - can never be as strong as that to the family and its tribal and ethnic extensions. The man who takes bribe sees himself as Robin Hood, not the wicked sheriff."

See The *Economist*, "The Most African Country" Jan. 23, 1982 at 12. In a different survey, Nigeria was also rated highest in the list of corrupt societies, ahead of Venezuela, Phillippines and Russia. See The *Economist*, March 19, 1994 at 86. Even though the mathematical exactitude of the survey may be questionable, corruption is a factor that can not be overlooked in a study of the Nigerian society.

Central Bank of Nigeria:

> [t]here appears to be a certain built-in stubbornness in the attitude of the typical Nigerian economic agent . . . It manifests itself in a strong propensity to circumvent laid-down rules of economic behaviour and to resist control and regulation . . . it tends to encourage a kind of softness and lukewarmness in the application and implementation of legitimate rules of economic conduct. Hence it provides a fertile ground for bribery, corruption, idleness and the contrivance of get-rich quick attitude which are antithetical to hard work and discipline.[20]

These problems (lack of infrastructure and social ills) have an undesirable impact on three major institutions that are of vital importance to the efficacy of shareholders' remedies: the judiciary, the stock exchange, and the Corporate Affairs Commission.

i. The Judiciary

Taiwo Osipitan, Professor at the University of Lagos, did a study of some of the problems of the Nigerian judiciary.[21] These include the absence of basic infrastructure such as adequate libraries, adequate rooms, and poor remuneration and conditions of service. These, according to him, lead to a negative attitude in judicial officers. He also indicts lawyers stating that they contribute to delays in court either deliberately, in order to leverage payment of fees, or for other strategic reasons. In addition, Nigerian judges still take evidence and write rulings and judgments in long hand. They do not have modern computers or electronic research facilities. All these cause unbearable delays in the administration of justice in general.

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[20] See A. Ahmed *supra*, note 8 at 14.

[21] See "The Problems and Causes of Delays in Criminal Justice Administration" in C. O. Okonkwo, *supra* note 14, 490 at 494-499. Although Osipitan identified these problems as causes of the delays in criminal justice in Nigeria, they are also applicable to corporate and commercial litigation.

In the administration of shareholders' remedies, the above problems are further compounded by the delays in concluding cases, the paucity of corporate cases, and the lack of a generalized, judicial expertise in corporate law issues and the dynamics of commerce.[22]

The training and experience of legal practitioners from among whom the judges are chosen also merit comment. Nigerian law firms are predominantly small firms of less than 5 lawyers on the average. Besides, the state of economic growth does not allow for watertight specialization in legal practice. Therefore, neither the judiciary nor the lawyers can unequivocally claim expertise in corporations law. In such environment, strong reliance on the judiciary to assess the conduct of directors and managers of corporations is a questionable strategy.

Unfortunately, the practice by most judges and academic scholars is to rely on British decisions which defer in a pronounced way to the exercise of managerial discretion. Ironically, these rules were formulated based on a different idiosyncratic historical development and functional imperatives.[23] This practice is clearly in error. The business environment in the two countries are considerably different as is the the efficiency level of the judiciary and the other institutions that contribute to the enforcement of shareholders' remedies.

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[22] Compare this to the Delaware judiciary in the United States of America. The Delaware judiciary is acclaimed to have experienced judges well versed in corporations law. This, it is argued, is the result of the fact that a majority of American corporations are registered in Delaware. This has enabled the judges to build immerse case law and precedents in corporations law. See R. Romano, *The Genius of American Corporate Law* (Washington, D.C.:A.E.I. Press, 1993) at 37-44.

[23] This is also the practice by some academic and even those in law reform. For instance, in the review and recommendations of the Nigerian Law Reform Commission on the reform of the Nigerian company law in 1990, on shareholders' remedies, 23 cases were cited out of which 22 were British decisions. See, *Working Papers on the Reform of Nigerian Company Law* (Vol.1) (Review and Recommendations) (Lagos: NLRC,1989) at 231 - 250.

ii. The Stock Exchange

The problems of communication discussed above weigh heavily on the Nigerian stock market. In addition, the political instability that has persisted in the country for many years discourages foreign investors and even local investors from investing in securities. This effectively limits the activities in the stock exchange.[24] Even the shares of those corporations that are listed are in the hands of shareholders who will not sell.[25] For this reason, the prices of shares at the stock market may not be a true reflection of the daily activities or underlying value of a corporation as it is a reflection of impressions held by the few regulators that manage the stock exchange and set the prices. As Gamaliel Onosode observes: "[i]n a regime under which price movements are not merely monitored but are as regimented or managed to the extent that I believe they are on the Nigerian stock exchange, there is hardly what one might call a market."[26]

These defects also make it difficult for investors to spread risk by investing in several companies. This is because price is not market dictated, supply is limited and the technical competence of the clerks who actually fix the prices is questionable.[27] Therefore, the Nigerian investor is unable to fully realize the benefit of portfolio management.

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[24] See the Post Express Newspaper (Nigeria) editorial of May 12, 1998, titled "Constraints to Development of Capital Market Identified".

[25] See G. Onosode, *Three Decades of Development Crisis in Nigeria* (Lagos: Malthouse Press, 1993) at 226 - 243. Even though his assessment of the stock market was made in 1990, the situation has not changed in this regard. Moreover, there are still few companies listed at the stock exchange. As at December 1996, 183 companies were listed. See International Finance Corporation, *Emerging Stock Market Factbook, 1997* at 192.

[26] *Ibid.* at 246.

[27] *Ibid.* Another major factor that contributed to the inefficiency of the Nigerian stock market was the delay that was caused by paper work and physical transfer of share certificates on the floor of the stock exchange commission. This position was altered in 1997 by the introduction of the Central Securities Clearing System which eliminates the physical exchange of share certificates. However, the full benefit of this new practice is yet to be realized.

iii. The Corporate Affairs Commission

The Corporate Affairs Commission (hereinafter "the Commission") is the body set up to administer the *Companies and Allied Matters Act*[28] (hereinafter "CAMA"). In addition to the problems that the Commission may have as an institution,[29] the social, political and economic problems of the country also tell on its performance. The Commission, as a "Nigerian", is also subject to the ethnic, tribal and social ills such as corruption that plague the country. This fact was noted by Professor Okonkwo of the University of Nigeria in his analysis of the composition and functions of the Commission, that there were "allegations of delay and corruption".[30] In addition to these social ills which arguably can be easily denied by the Commission, the other problems of infrastructure and communication no doubt reduce the level of efficiency of such a Commission. For this reason, it becomes questionable to construct a corporate code with shareholders' remedies built on the commission's supervisory role.[31]

Investors and stock brokers are still largely ignorant of the system, and there is also a distrust of the system by many shareholders who regard share certificates like land titles. See G.K. Olufon, "The Central Securities Clearing System and the Over the Counter Stock Market: Legal, Commercial and Ownership Issues Arising" (1997) 2 Modus Int. L. & Bus. Qtr. (N0 4) 21 at 25-27.

[28] Cap. 59 Laws of the Federation of Nigeria 1990. The Commission is established pursuant to s. 1 of the CAMA. Its composition and functions are fully outlined in the CAMA. See CAMA ss. 2 - 8.

[29] See Chapter Five.

[30] See "The Corporate Affairs Commission" in E.O. Akanki, *supra* note 5, 14 at 14. Although Professor Okonkwo was referring specifically to the Companies Registry, which is the predecessor to the Commission, the vulnerability of the Commission to these prevalent social ills cannot be ruled out.

[31] This is fully examined in Chapter Five.

c. Religion and Culture

Religion and culture may be thought to be totally unconnected with corporations law in general and shareholders' remedies in particular. In Nigeria, however, any careful study of the externalities that act upon the organizational process of the corporation would reveal that it does. One such study conducted by the United Nations Institute of Research for Social Development shows that family values and the Islam religion which is practised by majority of the people of Kano, Nigeria, are values that could have some impact on managerial capacity, business development and shareholders' remedies. In a study of Kano, the third largest commercial city in Nigeria, the report states:

> In Kano . . . the family and the community have always been important sources of managerial capacity and business development. Mediated by the ideology of Islam, the family and the community are apparently ranked highly even where these may appear to be in direct conflict with the profit motive.[32]

Corporate organizational structures aside, proceedings and activities for most of the Nigerian corporations are operated in an informal manner. Although this statement applies mostly to the small, closely-managed corporation, the truth is that this type of corporations form the highest percentage of the total number of registered corporations in Nigeria.[33]

d. Ownership Structure of Nigerian Companies

The dictates of the Nigerian political economy show a peculiar ownership structure that should also be considered in the law of shareholders' remedies. The CAMA structurally distinguishes between different types of corporations: private and public companies, company limited by shares, the company limited by guarantee, and unlimited companies.[34] The same type of remedies are available for shareholders of all types of companies. The credibility and effectiveness of such an approach becomes questionable in view of the organizational differences in the companies, particularly with the private and the public companies.

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[32] See A. Olukoshi *supra*, note 13 at 3.

[33] From a 1996 survey by the Federal Office of Statistics, out of a total of 58,665, 8,341 were private limited companies, 3,575 were public limited companies. But in terms of size, with a grading scale of 0 - 1000+, 2,808 were in grade (0 -4), 37,808 in grade (5 -9), 11,539 in grade (10 - 19), 4, 411 in grade (20 - 49) while 1, 036 were in grade 50 - 99. Only a few exceded 100 grade as follows: 532 in grade (100 - 199), 338 in grade (200 - 499), 111 in grade (500 - 999) and 82 in grade (1000+). See *Annual Abstract of Statistics, supra* note 17, at 301, Table 251.

By way of introduction, it should be emphasized that, the Nigerian company is generally closely-held. These closely-held corporations may be categorised into groups. Group 'A' companies are the oil companies in which the government holds about 60% shares with foreign multinational corporations holding about 30-35% shares, and the remaining 5% shares are held by a very large number of local investors. In Group 'B', there are large and medium industrial, commercial and agriculture-allied industries. Here, the multinational hold block shares, usually a majority of 40 or 60%, while very many local investors hold the remaining shares in bits and pieces.[35] These type of companies may be private or public. Group 'C' contains the small and medium sized companies. Here, the local middle class (usually a few) hold the majority of shares, and other family and friends hold the balance.[36]

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[34] See CAMA, ss. 21-26. A private or public company may have the liability of its members limited to the unpaid amout of the shares taken by its members (limited by shares) or limited to the amout the members agree to contribute in the event of winding up (limited by guarantee). It may also be an unlimited company which does not have any limit on the liability of its members. (This type of companies are usually required by law for some regulated businesses like insurance brokers.)

[35] It has been well observed that "whatever elements of control that go with 60% equity interest of indigenised enterprises are weakened by the atomistic nature of indigenous equity shareholding." See *A.A.Akinsanya, supra* note 15 at 179.

[36] It is also argued that this ownership structure was encouraged by the indigenisation process. At the policy level, the indigenisation process was supposed to reduce foreign control of the Nigerian economy. The effect however was to enrich the few Nigerians who had the resources to buy the shares of the foreign shareholders at the divestment period. That "[t]he Nigerian Business Enterprises Decrees of 1972 and 1976 . . . when taken in a wholistic framework amout to no more than the indigenisation of the exploitation of the Nigerian nation by the affluent members of the national bourgeoises", that, "those who have acquired the shares are, by and large, the elite . . ." See, A. A. Akinsanya *supra*, note 15 at 180, quoting Oyebode and Akeredolu-Ale respectively.

The Group 'D' category refers to the sole shareholder corporation. Even though at least two shareholders are required to incorporate a company in Nigeria,[37] this is usually satisfied as a matter of formality by shareholders adding a family or friend's name.

In most private companies, shareholders do not always have articulated agreements for their daily business transactions and the corporate organization. Similarly, such shareholders tend to have more information problems because they are not highly experienced in commercial and corporate practice, and usually exhibit a reluctance to seek legal advice. Although these charateristics of the shareholders of a closely-held corporation may also hold true for some shareholders of public companies, the expectations of these latter shareholders are usually different. For private companies, the shareholders often take the company as their own property (notwithstanding the legal provisions for legal personality), and usually, they want to be part of the management of the company. This may not be the same for shareholders of public companies who more likely see their shares as a relatively passive investment vehicle.

Second, it is the social and economic context which determines whether transferability of shares -- which is traditionally ascribed to public companies -- benefits shareholders of Nigerian public companies. That is, it is argued by many Canadian scholars such as Brian Cheffins, that shareholders of private companies should have greater access to the courts than those of public companies, [38] because, it is assumed, shareholders of public companies can always sell their shares if they become disenchanted with management. But a close look at the Nigerian situation would show that this argument is not easily transferable. This is because, first, the shareholders in a Nigerian public corporation is even less likely to know of bad management than his North American counterpart because of information problems. The option of selling shares in response to bad management is academic. Second, even when a shareholder in a public corporation is aware of mismanagement, the sale and transfer of shares may not also be as quick and efficient as it is in North America given the lack of a strong securities market, for example. And, finally such shareholder may not be able to afford the cost and delay of corporate litigation.

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[37] See CAMA s. 18.

[38] See B.R. Cheffins, *Company Law Theory, Structure and Operations* (New York: Clarendon Press, 1997) at 463 - 465.

The previous sections of this chapter have illustrated the peculiar social, economic, political and cultural setting of Nigeria and calls for a study of shareholders' remedies in context. The impact of Nigeria's socio-political, cultural and religious environment as well as corporate ownership structure becomes very glaring when specific remedies are examined in its light. As will be seen in subsequent chapters, a remedial system constructed without consideration of these local factors would be unable to give shareholders effective protection. A central problem is that Nigerian remedial system is built on the right of shareholders to go to court in a society with a chronically inefficient judicial system.[39]

IV. Reasons for Shareholders' Remedies in the Nigerian Context

In both the advanced North American economies and the developing economies like the Nigerian, the shareholders' remedies are central to corporations law. This is because shareholders' remedies define the scope, ambit and strength of the rights of shareholders: *ubi jus ibi remedium.*[40] The overriding position of shareholders' remedies in corporations law is well articulated by Professor Ziegel thus:

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[39] Compare to the Canadian situation. The Committee for the reform of the Canadian Business Corporations Law headed by Robert Dickerson stated that "the best means of enforcing a corporation law is to confer reasonable power upon the alleged aggrieved party to initiate legal action." See R.W.V. Dickerson, J.L. Howard and L. Getz, *Proposals for a New Business Corporations Law for Canada* (Ottawa: Information Canada, 1971) at 158 paragraph 476. (Hereinafter the "Dickerson Report")

> [i]f the rights given to shareholders, whether by statute or by contract, are to be worthwhile, corresponding effective remedies must also be available to cure their breach . . . . Remedies, generally speaking, are the means for ensuring that shareholders are given the rights to which they are entitled."[41]

For the Nigerian shareholder, remedies are of a higher value for a number of reasons which follow.

a. Agency cost

In large public corporations and other medium sized corporations (private or public), the separation of ownership and control is real only to the extent that the many shareholders who constitute the minority (as in Group A and B above) have no representation on the board of directors. Second, in companies jointly owed by the government and private individuals, the appointment of government representatives to the board who have no stake whatsoever in the company, creates a higher tendency for these directors to run the company for their personal or governmental benefit. This is aggravated by information problems and the fact that the private minority shareholder tends to be unsophisticated. Ethnic, religious factors, and sometimes self-interest determine the awarding of company contracts and not pure business and efficiency considerations. Some other abuses of the company include the holding of meetings in places far from the residence of majority of the shareholders, favourable contracts to directors and managers or their assigns and the misuse of the corporate assets. This unfortunate situation is well analysed by Professor Akanki who observes that:

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[40] When there is a right, there is a remedy

[41] See J.S. Ziegel, R.J. Daniels and J.G. MacIntosh, *Cases and Materials on Partnerships and Canadian Business Corporations* (3ed.) Vol. 2, (Toronto: Carswell, 1994) at 1127.

> [m]any company directors in Nigeria are men of intergrity. . . . But, regretably indeed, we have on the other hand, those who hustle and lobby for board appointments only to serve themselves the meat and malt, the cake and ale of the company. The adventure varies from bared faced stealing through the "commission percentages" and other shady deals to diversion or interception of corporate opportunities. . . .These activities are aided by the powerlessness of shareholders to adequately control the directors. Of course, it is often too difficult for the shareholders to discover what is going on . . . [42]

b. Self interest

By far the biggest problem in the Nigerian situation is self interested directors, that is, directors who seek to benefit personally at the expense of the corporation. In the large and medium sized corporations, the self-interested director may not be a big problem for the majority shareholders because directors are usually appointed by them, are their representatives, and even their friends and relatives. When a director benefits, the majority shareholder is still in charge: she can condone the benefit or vote the director out of office.[43] The shareholders who carry the biggest risk are the widely 'scattered' small shareholders who know nothing about the management of the corporation.

The above problems also affect the minority shareholders of the small and medium companies. Here, the majority shareholder, who is typically involved in management, tries to run the company as his own at the expense of the other shareholders. Forms of of abuse include: exclusion from management,[44] use of corporate opportunity,[45] self dealing by giving contracts to themselves, friends and relatives, non payment of dividends, and the fraudulent takeover of other shareholders' interests.[46]

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[42] See "Company Directors' Responsibility" *supra*, note 18 at 3.

[43] Directors can be removed by an ordinary resolution. See CAMA s. 262. With majority votes, such shareholder can easily remove any director at will.

The multinationals, at times also exploit the unsophisticated nature of the business environment and the other economic problems in Nigeria by running their companies in favour of the overseas parent companies at the expense of the local shareholders. Some of the ways this is carried out include unfair contractual arrangements with their overseas parent companies in order to facilitate the transfer of money out of Nigeria or to evade taxation. In the end, the local stockholders of such corporations suffer.

c. Viability of the Corporation and Promotion of Investment

In the Nigerian society, the general quest for economic development also raises a need for the effective protection of shareholders. This is to protect the viability of the corporation itself by encouraging investment. Problems of trust and accountability in a country ridden with corruption, advanced fee fraud and other economic crimes, however, discourage people from pooling resources together as a corporation. This essentially destroys the micro and macro economic advantages of the corporation as a means of capital accumulation for investment. Therefore, in such a society, effective shareholders' remedies are required --

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[44] See *Yalaju Amaye* v. *Associated Registered Engineering Contractors Ltd*, [1990] 4 NWLR 423 (S.C.Nig.), where the Plaintiff holding 16.6 % of the shares against other shareholders holding 83.3 %, was excluded from management, his dividends not paid, and his shares sought to be bought over by fraudulent means.

[45] See *M.A.Omisade* v. *Harry Akande*, [1987] 2 NWLR 156.(S.C.Nig.) Here, of two shareholders holding 50 % shares, one of the shareholders fraudulently transferred the agency business of the company to another company wholly owed by him.

[46] See *F.A.T.B.* v. *Ezegbu*, [1994] 9 NWLR 150 (C.A.Nig.). Here, two factions of the shareholders of First African Trust Bank Ltd had two separate list and register of shareholders, one of which excluded the members of the second faction.

remedies that match the environment - so as to raise the public confidence on the corporation as a means of combining resources.

d. Structure of Corporations Law

Remedies in the context of the Nigerian environment also determine the structure of the Nigerian company law. From an economic perspective, resources for market regulation of corporate abuses are largely absent. Therefore, a Nigerian law of shareholders' remedies fashioned on the strength of the market control is obviously misplaced and prone to failure. Similarly, the inefficiency of the bureaucratic institutions also make the administrative control of corporate abuses ineffectual.

Akin to the above is the fact that the socio-economic environment also determines the efficiency of the internal protective devices in corporations law for shareholders. These devices are usually in the form of default rules by which shareholders choose certain forms of control and restriction of directors' powers and the general affairs of the corporation. In the Nigerian situation, due to the unsophisticated nature of majority of the shareholders, these kind of devices are not very effective because shareholders do not pay serious attention to such issues.[47] In such an environment, shareholders' remedies are the most tangible and practical protection that shareholders really have.

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[47] This may not be an exclusively Nigerian problem. Such problems are well recorded in Canada. From an empirical study conducted on public corporations registered in the province of Alberta, by R.J. Wood, M.T. Brown and R.W. Bauman, the scholars reveal that "Many of the default rules . . .are virtually never included in corporate constitutions". See "Modifications To Corporate Constitutions in Alberta: An Empirical Study" (1993) 31 Alta L. Rev. 263 at 291(Footnotes omitted). The research was restricted to data from which the above conclusion was drawn. The sociological and economic behavioural pattern of shareholders in Nigeria, for instance, will easily explain this trend. Some shareholders do not even read the memorandum and articles of Association. On the other hand, some lawyers tend to adopt the same prototype Memorandum and Article of Association without much modifications to suit the needs of each company. (See also R.M. Ewasiuk, "The Business Corporations Act - The Distinction Between Bylaws and Articles of Association" (1983) 21 Alta L.Rev. 381)

V. Conclusion

The Canadian social, political and economic environment is far more advanced than its Nigerian counterpart. The communication system -- newspapers, telecommunication and electronic -- is also more sophisticated and efficient. Furthermore, the other social ills -- corruption and ethnicism-- as it operates in Nigeria is not present in Canada, at least not to the same degree. To the extent that such problems exist, they are not known to have impacted in any fundamental way on government regulatory institutions nor on the administration of justice.

Although the Canadian judiciary may not claim equal expertise with judges in Delaware,[48] they are well equipped and trained due to the level of development and education in Canada, the quality of research facilities for judges, and relative speed with which a shareholder can get into court, at least when compared to Nigeria. On these facts, the Dickerson Committee was justified in formulating the Canadian corporations law to:

> confer reasonable power upon the allegedly aggrieved party[shareholder] to initiate legal action to resolve his problems.. . . obviating the need for sweeping administrative discretion and harsh penal sanctions, and, at the same time, forcing resolution of the issues before the courts, which have the procedures, the machinery and the experience that enable them better than any other institution to deal with such problems.[49]

In addition, the Canadian stock exchange is also more organised than its Nigerian counterpart.[50] In that respect, the argument that shareholders could easily sell their shares in cases of corporate abuse could very well hold for Canadian public companies, a matter explored in the early part of this thesis.

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[48] See R.J. Jeffrey and G. Machintosh, "Towards a Distinctive Canadian Corporate Law Regime" (1991) 29 Osgoode Hall L. J. 863 at 884. One of the reasons given for this is that Canadian courts, compared to Delaware courts see few corporate law cases.

[49] See the Dickerson Report *supra*, note 39 at 158, para. 476.

[50] See R.J. Jeffrey and G. MacIntosh, *supra* note 48 at 876 - 877. Jeffrey and Machintosh are of the view that the Canadian capital market, in general terms, is efficient on the ground of availability of information. They also identified however, some sources of inefficiency, such as the restrictions on individual share holdings in some corporations.

In terms of the ownership structure of the Canadian corporation, many scholars agree that there is high concentration of share ownership in Canada. Ronald Daniels and Jeffrey Machintosh estimates that 14% of the shares are widely held, 60.3 % are owed by a single shareholder with legal control, while 25.4 % are owed by a single shareholder with effective control (that is, 20 - 49.9 % of voting shares or 2 or 3 shareholders with 10 - 20 % of voting shares).[51] Based on the figures above, they argue that such majority shareholders in Canada have better incentives to monitor management and can also discipline management. They also argue that with this kind of structure, the problem of agency cost that results from managers' abuse is less serious. Instead, what is more likely to occur is minority oppression.[52]

The economic, political and social environment of Nigeria and Canada as seen above, are totally different. Even the ownership structure of corporations is different. Though it is contended by Sandra K. Miller that the problem of minority shareholders is universal regardless of the country of domicile,[53] the problem ought not to be approached generically. As explored above, while the Canadian corporate system may safely and effectively be built around the judicial system, this may not be the best approach for the Nigerian system. For example, as will be seen in later chapters, the fact that the Nigerian courts do not function efficiently must be taken into account when forging remedies for the minority shareholder.[54] Put another way, the adequacy of shareholders' remedies in the protection of shareholders and the corporate vehicle itself is better accessed *in situ*. It is better judged by an analysis of remedies in the social, political and economic environment of the particular country in question, and not exclusively through dry letters of corporate law. Moreover, peculiar socio-economic and political environments should also be reflected in evaluation of the theoretical background as to the aims, objectives, and goals of the Nigerian company law. When the objective is economic development, this is a more productive approach than the more radical stance advanced by some of the theorists discussed in Chapter One. The theories they advocate, when examined in the light of these socio-economic factors, are too far removed from the practical realities of the Nigerian company.

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[51] *Ibid.* at 884.

[52] *Ibid.* at 884 - 887. Also in support of the view that the Canadian corporation is closely held, see D.A. Demott, "Oppressed But Not Betrayed: A Comparative Assessment of Canadian Remedies for Minority Shareholders and Other Corporate Constituents" (1993) 56 Law and Contemp. Problems 181; R.J. Daniels and P. Halpern, "Too Close for Comfort: The Role of the Closely Held Public Corporation in the Canadian Economy and the Implications for Public Policy" (1996) 26 Can. Bus. L.J. 11 at 30-32. Here, Daniels and Hapern attempt to provide reasons for the prevalence of the closely held corporation.

[53] See "Minority Shareholder Oppression in the Private Company in the European Community: A Comparative Analysis of Germany, United Kingdom, and the French." (1997) 30 Cornell Int. L.J. (No 2) 381. Miller even states that in America, most businesses are closely held and so creates serious minority problems, at 383.

The contemporary debate concerning shareholders' protection and remedies is intense and occasionally even puzzling. Such questions as the structure of corporations law -- whether self regulatory, deregulated or mandatory by law -- and the need for the distinction between remedies for public corporations and remedies for private corporations are common focal points. Other incidental issues like the grant of discretionary powers to the courts in shareholders' litigation, concerns about delays in litigation, and the quest for alternative remedies for shareholders through stock exchange commissions and other administrative control remain unsettled.[55]

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[54] This question was among some of the issues that Richard Kraakman, Bernard Black and a team of others had to tackle in trying to carve a corporations law for Russia after the collapse of socialism. The Russia social, economic and political environment greatly affects the efficiency of their judiciary like most developing countries. See R. Kraakman, B. Black and J. Hay, "A Self Enforcing Model of Corporate Law" (1996) 109 Harvard L.Rev. 1911.

These theoretical complexities -- when combined with the unique challenges posed by Nigeria's socio-political, economic, cultural and religious environment -- suggest that the reform of shareholders' remedies is inherently complex and cannot be advanced by simply trying to rationalize corporate principles and concepts in accordance with foreign standards. Neither can they be solved by simply importing the corporate law statutes of foreign jurisdictions.

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[55] See D. Sugarman, "Reconceptualising Company Law: Reflections on the Law Commission's Consultation Paper on Shareholder Remedies: Part 1" (1997) 18 The company Lawyer 228, and D. Sugarman, "Reconceptualising Company Law: Reflections on the Law Commission's Consultation Paper on Shareholder Remedies: Part 2" (1997) 18 The Company Lawyer 274.

CHAPTER 3

CORPORATE GOVERNANCE AND THE DERIVATIVE SUIT: A COMPARATIVE AND CONTEXTUAL ANALYSIS

I. Introduction

Abuse of the corporate vehicle in whatever form - - such as those illustrated in Chapter Two -- is an injury to an abstract entity, according to both the fiction and real entity theories. It is also the case however that it is the individual shareholders who ultimately suffer whatever loss the corporation incurs by any abuse.

At common law, attempts were made to provide the individual shareholder with the right to sue for and on behalf of the corporation to redress injury to the corporation even though the injury did not directly affect the shareholder in a personal capacity. The common law principles associated with this remedy have been modified and reformulated in a statutory procedure that enables shareholders to sue on behalf of the corporation. This chapter examines the efficacy of such an action in preventing or remedying corporate abuse. The chapter is divided into several parts: Part II and III trace the history of the derivative action at common law and highlights its inadequacies. The chapter also analyses in Part IV, the statutory reforms in the derivative suit under Canadian company law. Part V considers statutory reforms in the CAMA. Furthermore, Part VI analyses how the new statutory derivative action both under Nigerian and Canadian law has modified the principles of majority rule in corporate management. Above all, Part VII assesses the overall purpose and aims of the derivative suit and considers whether, in fact, the resources necessary for the full realization of the benefits of this type of action exist in the developing, Nigerian economy.

II. History and Scope of the Common Law Derivative Action

The term "derivative action" refers to the action by a shareholder to remedy the breach of a right or duty owed to a corporation. At common law, this was known as the "minority shareholders' action."[1] This right of action was formulated in the English decision of *Foss* v. *Harbottle*,[2] to protect minority shareholders while safeguarding majority rights.

After more than a hundred and fifty years, the scope and ambit of the minority shareholders' action as formulated in *Foss* v. *Harbottle* remain in obscurity.[3] Its usefulness as a protective device for shareholders has been found destitute and the remedy has been rejected by many scholars and judges. According to Stanley Beck, "[i]t is rarely possible to say in a given case whether the rule will act as a protector or destroyer of those rights[of minority shareholders]. Its application is clearly uncertain and inevitably, therefore, the rights of the minority are uncertain."[4]

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[1] This is in contrast to the personal action by a shareholder to enforce a personal right. See Chapter Five. The term derivative action is from American corporate law, where the nature of the derivative suit was first recognized. See P.L. Davies, ed., *Gower's Principles of Modern Company Law* 6th ed. (London: Sweet and Maxwell, 1997) at 666 and B.S. Prunty, Jr., "The Shareholders Derivative Suit: Notes on its Derivation" (1957) 32 N.Y.U.L.Rev. 980 at 985-992. See also the side notes to s. 303 of the Nigerian *Companies and Allied Matters Act* cap. 59, Laws of the Federation of Nigeria 1990 (hereinafter "CAMA" and s. 238(1) of *Canada Business Corporations Act* R.S.C. 1985, c. C-44 (hereinafter "CBCA"). Professor Welling prefers the term "representative action" instead of "Derivative action." This, according to him, is to avoid the danger that the Canadian derivative action may be interpreted with the technical limitations of the U.S. derivative suits. See B. Welling, *Corporate Law in Canada, the Governing Principles* (Toronto: Butterworths, 1991) at 544-546. This fear may not be justified since the Canadian statute provides the rules for the new derivative action. More importantly, the use of the term "representative action"as suggested by him, will effectively blur the distinction between this type of action and the pure representative action (class action) by a shareholder on behalf of himself and other shareholders.

[2] (1843) 2 Hare 461(Ch.)

[3] Recently, the British Law Commission, stated that "to obtain a proper understanding of the rule, one needs to examine numerous reported cases decided over a period of 150 years. . . ." See, *Shareholder Remedies, Consultation Paper No 142* (London: Stationery Office, 1996) at 40 (hereinafter "Consultation Paper No 142").

[4] See, "An Analysis of *Foss* v. *Harbottle*" in J.S. Ziegel, ed., *Studies in Canadian Company Law* (Toronto: Butterworths, 1967) 545 at 596.

In *Foss* v. *Harbottle,* shareholders of the Victoria Park Company, on behalf of themselves and other shareholders, sued the directors of the company for the allegedly fraudulent sales of its directors' properties to the company and other fraudulent dealings in the operation of the company. The court formulated two principles: when a wrong is done to a corporation, only the corporation is the proper plaintiff to sue to remedy the wrong; and where the wrong is one that can be made binding on the corporation by the resolution of a simple majority, no individual can sue.[5]

Four exceptions were, however, recognized through which an individual can sue notwithstanding the proper plaintiff rule and the majority rule stated above. These are:

a. *ultra vires* or illegal transactions: A shareholder could sue in a personal action to restrain a corporation from an *ultra vires* transaction, as in *Smith* v. *Croft.*[6] However, the proper plaintiff rule becomes applicable when a shareholder sues to recover property and/or money transferred or paid out pursuant to an *ultra vires* transaction. Here, as this is a wrong to the corporation on the facts, the shareholder could only sue on behalf of the corporation in a derivative suit and not in a personal action.[7]

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[5] These rules are commonly referred to as the proper plaintiff rule and the majority rule respectively. Even though the two rules interlock, they still differ in their applications. See R.R. Pennington, *Company Law* 7th ed.(London: Butterworths, 1995) at 864 -865.

[6] See *Smith v. Croft (No 2)* (1986), [1987] 3 ALL E.R. 909 at 942j - 943j.

[7] See *Smith v. Croft (No 2), ibid.* at 945(d) -(j).

b. special majority's exception: A shareholder can also institute a personal action to restrain any act which the company intends to take by an ordinary resolution, where the articles requires a special resolution. Similarly, if the irregularity or illegality complained of can only be authorized by a special resolution, an ordinary resolution will not suffice.[8]

c. shareholders' personal rights exception: Where the act complained of constitutes a breach of the shareholder's personal rights.[9]

d. fraud on the minority exception: The rule in *Foss* v. *Harbottle* does not apply when what has been done constitutes a fraud on the minority and the majority are in control. In clear cases of fraud, defined in its wider sense, such as the sale of worthless items to the corporation, or where directors divert the business of the company to themselves,[10] a shareholder could institute an action on behalf of the company. Such an action by shareholders is permissible because as was stated in *Prudential Assurance* v. *Newman Industries Ltd. No.2.* "if they were denied that right, their grievance could never reach the court because the wrong doers themselves, being in control, would not allow the company to sue."[11] It also should be noted that traditionally regarded, fraud does not cover mere negligence by the directors.[12]

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[8] See *Edwards* v. *Halliwell,* [1950] 2 All E. R. 1064 at 1067-1068. (C.A.)

[9] Detailed analysis of this type of action is discussed in Chapter Five.

[10] See *Cook v.Deeks,* [1916] 1 A.C. 554 (H.L.) and *Atwool* v. *Merryweather* (1867), L.R. 5 Eq. 464n.

[11] [1982] 1 All E.R. 354 at 358 (C.A.)

[12] See *Pavlides* v. *Jensen,* [1956] Ch. 565 at 572-577 (Ch.D.). For further discussion on this point, see note 17 and accompanying text.

III. Defects of the Common Law Derivative Action

The common law derivative action was initially formulated by the courts as a minority shareholder's remedy. Unfortunately, theoretical and historical inconsistencies choked its usefulness to shareholders as a protective device. This is because its formulation and growth was influenced and directed by the corporate legal personality theory and the partnership concept.[13] Consequently, the ability of and attempts by common law judges to develop the derivative action as an effective remedy for shareholders were thwarted by the combination of this anthropomorphic fallacy of corporate legal personality and the majority principle of partnership law.

The exceptions to the rule in *Foss* v. *Harbottle* appear well stated and comprehensible. In practice, the distinction between a shareholder's personal right and the corporate right blurs the categorization of the four exceptions as distinct and independent situations where a shareholder can sue on behalf of the corporation. It was recognized that a shareholder can sue to restrain an *ultra vires* act as in *Smith* v. *Croft* (No 2)[14] or to restrain an act which the company intends to carry out by an ordinary resolution where the constitution of the corporation stipulates a special resolution for such acts. The problems emerge when a shareholder sues for damages resulting from an *ultra vires* transaction or an act authorized by ordinary resolution instead of a special resolution. Here, the shareholder has to prove fraud on the minority and the fact that the wrongdoers are in control. This is because as stated by Knox J. in *Smith* v. *Croft* (No 2), where a shareholder seeks compensation for loss resulting from an *ultra vires* act, "the wrong. . . is a wrong to the company, which has the substantive right to redress."[15] This confusion creates serious problems of choice as to the appropriate remedy: is it a personal action or a derivative one.[16]

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[13] See K. Wedderburn, "Shareholders' Rights and the Rule in *Foss v. Harbottle*" (1957) Cambridge L.J. 194 at 195-198.

[14] *Supra*, note 6.

The fraud requirement on its own was another setback because its proper scope was undefined. Apart from this uncertainty, another limitation was that the common law derivative action was not applicable to directors' negligence.[17]

The "wrongdoer control" requirement was another hardship for shareholders' derivative action because its reach was uncertain. It was stated in the *Newman* that there is control if it would be futile to call a meeting of the shareholders because the wrongdoers could influence the result, or if by any means of manipulation the wrongdoers ensure that the company does not sue,[18] but the length to which this liberal construction of the control requirement would be carried was uncertain.

Furthermore, the control requirement was also criticized for other practical reasons.

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[15] See *Smith* v. *Croft, supra* note 7 at 945h. The court also held that because of the fact that the wrong is to the company, the shareholders, even though they can not ratify an *ultra vires* transaction, can decide by resolution not to sue and such resolution bars further action by the company.(At 947(b) -(h). Professor Gower queries this conceptual, legal distinction between the right to ratify an *ultra vires* act and the right to decide not to sue to recover money paid out in an *ultra vires* transaction as unclear and problematic. See Gower *supra*, note 1 at 673 - 675, and the discussions of the *ultra vires* exception to the rule in *Foss* v. *Harbottle* at 663.

[16] This confusion has serious consequences including the choice of the appropriate procedure for instituting the action. This was clearly manifested in the *Newman case, supra* note 11.

[17] In *Pavlides* v. *Jensen, supra* note 12, the court held that negligence was not within the exceptions under which shareholders can sue. But in *Daniels* v. *Daniels* (1977), [1978] 2 W.L.R. 73 at 79-80. (Ch.), the court was willing to entertain shareholders' action based on directors' negligence where the directors derived personal benefits from the negligence. Professor Wedderburn still argues that there are cases which fall in between mere negligence and direct misappropriation, so even the approach in Daniels case does not draw any clear line. See K.W. Wedderburn,"Shareholders' Rights and the rule in *Foss* v. *Harbottle* [1958] Cambridge L.J. 93 at 96-105.

[18] See *Russel* v. *Wakefield Waterworks Co.* [1875] L.R. 20 Eq. 474 at 482

For example, intangible control such as informal agreements and personal influence are difficult to identify.[19] In large public companies especially, where the shareholders are numerous and scattered, it is difficult to identify any majority control. In such circumstances, directors could wield control without any voting control.[20]

Perhaps the most obvious weakness of the common law derivative action is its subjection to the wishes of the majority decision. Although transactions outside the power of the corporation could not be ratified at common law,[21] this was not the case for breach of directors' duties to the corporation. Common law created unclear lines of demarcation between breaches of directors' fiduciary duties which constitute a fraud on the minority and therefore unratifiable, and breaches which do not, and so are ratifiable by the shareholders.[22] Many scholars agree that it is not possible to identify the dividing line between ratifiable conduct and some other non ratifiable conduct.[23]

These defects are further worsened by the fact that the majority approval is not a good standard of judgment. This is because the shareholders have power to exercise their votes in any way they like because they owe no duty to the corporation or other shareholders.[24]

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[19] See K. Wedderburn, *supra* note 17 at 95-96. See also M.A. Pickering, "Shareholders' Voting Rights and Company Control" (1965) 81 L.Q.R. 248 at 269-272.

[20] See Consultation Paper No 142, *supra* note 3 at 32-33.

[21] See *Ashbury Railway Carriage and Iron Co.* v. *Riche*, [1875] L.R. 7 H.L. 653 (H.L.).

[22] See *Cook* v. *Deeks supra,* note 10 at 563-565. But in *Northwest Transport Corp.* v. *Beatty* (1887), 12 App. Cas. 589 at 600-601 (H.L.), ratification was upheld. Similarly, in *Regal (Hastings) Co Ltd* v. *Gulliver*, [1942] 1 All E.R. 378 (H.L.), the court held that ratification was possible, even though there had been none on the facts.

[23] See Gower, *supra* note 1 at 647, and S. Beck, *supra* note 4 at 572-581.

In the same way, the majority principle also created the problem of distinction between mere irregularities in the conduct of the business which is within the authority of the majority shareholders to regulate and others that touch the shareholders' personal rights.[25] In small companies with a noticeable majority, this could leave the minority shareholder without a remedy.[26] In large publicly traded companies, the usual absence of a large number of the shareholders in shareholders meetings makes the majority rule questionable.

Other procedural limitations at common law created further hardship for shareholders in instituting this type of action. The court's equitable jurisdiction imposed restrictions on the availability of the remedies -- it would consider, for example, the conduct of an applicant[27] and the availability of other remedies.[28] Apart from these legal and procedural limitations,[29] the cost of the action was a deterrent to bringing it. Although in *Wallersteiner* v. *Moir (No.2)*,[30] the court expressed the necessity of awarding an indemnity to the plaintiff /shareholder against the assets of the company, this judicial approach was exceptional.

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[24] See *Beatty supra*, note 22. Here, the court held that a self dealing director could vote in his capacity as a shareholder to ratify his misconduct.

[25] In *MacDougall* v. *Gardiner* (1875), 1 Ch.D. 13 (C.A.), the court held that a shareholder whose call for a poll in a resolution for adjournment was refused by the chairman, could not sue because, even though the refusal was wrong, it is an internal irregularity and only the company could sue to redress the wrong. But see *Pender* v. *Lushington* (1877), 6 Ch.D. 70 at 80.

[26] The only exception is where the minority shareholder can prove that the conduct is oppressive to him.

[27] See *Towers* v. *African Tug Co.* [1904] 1 Ch.558 at 567 (Ch.)

[28] See Gower, *supra* note 1 at 669

[29] For a detailed analysis of the defects of the common law derivative action, see Consultation Paper No 142 *supra*, note 3 at 27-49

[30] [1975] Q.B. 373 at 396(c) and (d), 405(d) and 409(d) (C.A.)

Furthermore, the plaintiff/shareholder could not secure an order to have the money judgment paid to himself. As a wrong to the corporation, any amount payable was to the corporation since the injury for which the action is instituted is to the corporation.[31]

The inadequacies of the shareholders' derivative action at common law were not simply as a result of the decision in *Foss* v. *Harbottle*. Rather, they were, as shown in the decision, a reflection of the fundamental principle of corporate legal personality and the sociological interpretation of this abstract entity -- the corporation. All the courts at common law did, and confusingly well, was to formulate a series of rules and principles that come from the idea of corporate personality and the assumptions concerning the internal management of the corporation.[32] Therefore, any attempt to remove or lessen the problems of common law derivative action, involves not a simple review or even repeal of *Foss* v. *Harbottle* but a re-examination of some of the rules that flow from the corporate personality theory and the legal behavioral pattern of the corporation.

IV. Statutory Reform of the Derivative Action in Canada

The story of the statutory derivative action in Canada is one that Professor Welling describes as a "story of a disease, a purge and a cure".[33] In short, the substantive and procedural limitations of the common law derivative action were also present in Canadian corporate law.[34]

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[31] This was so even where the wrong to the corporation affects the market value of the shares of the shareholder. See *Newman supra*, note 11.

[32] See S.M. Beck, "The Shareholders' Derivative Action" (1974) 52 Can. Bar. Rev.159 at 164 -169.

[33] See B. Welling, *Corporate Law in Canada: the Governing Principles* (Toronto: Butterworths, 1984) at 502-503. (This is omitted in the 1991 edition).

The Dickerson proposals for a review of Canadian corporate law[35] recognized the importance of the corporate vehicle in the country's economic system. It equally recognized the "inexhaustible ingenuity of the unscrupulous to exploit this quality to further their own ends".[36] In the view of the Dickerson Committee, corporations law would be better enforced by giving aggrieved parties reasonable power to initiate legal action. Therefore, dissatisfied with the legal and procedural restrictions of the rule in *Foss* v. *Harbottle*, it recommended the abrogation of the rule to make way for a new statutory derivative action. In the words of the Dickerson Report, "we have relegated the rule to legal limbo without compunction, convinced that the alternative system recommended is preferable to the uncertainties -- and obvious injustices -- engendered by that infamous doctrine."[37]

In accordance with the recommendations of the Dickerson Report, the CBCA provided for a statutory derivative action. The new statutory derivative action empowers any registered holder, beneficial owner, former registered holder, or beneficial owner of a share of a corporation or its subsidiary, to institute an action in the name and on behalf of such a corporation, to remedy a wrong to the corporation or to intervene in any action in which such a corporation is a party in order to prosecute, defend or discontinue such action.[38]

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[34] See S.M. Beck, *supra* note 4, and J.G. MacIntosh, "Minority Shareholder Rights in Canada and England: 1860-1987" (1989) 27 Osgoode Hall L.J. 561 at 599-615.

[35] The committee for the review of the Canadian Business Corporations Law named after its chairman R.W.V. Dickerson (hereinafter the "Dickerson Committee") made proposals which formed the basis for the CBCA. See R.W.V. Dickerson, J.L. Howard and L. Getz, *Proposals for a New Business Corporations Law for Canada* Vol. 1, (Ottawa: Information Canada, 1971) (hereinafter the "Dickerson Report").

[36] *Ibid.* at 158, Para. 474.

[37] *Ibid.* at 161, Para. 482.

However, such action can only be instituted with leave of the court[39] as guided by certain statutory conditions.[40] To grant the application, the court must be satisfied that: (a) reasonable notice has been given by the shareholder to the directors of the corporation of his intention to sue, (b) the action is brought in good faith (c) the action appears to be in the interest of the corporation. The court is given wide powers under s. 240 to make appropriate orders.

Based on the recommendations of the Dickerson Report, other substantive limitations associated with the common law derivative action have been removed. In particular, the CBCA provides that ratification of the wrongful conduct alone shall not be a ground for the dismissal of the derivative action application, but may be considered by the court in making appropriate orders.[41] This is further fortified by the provision that the approval of court is required for a stay, discontinuance or settlement of any action so instituted.[42] Besides, the CBCA also provides some costs incentives to shareholders. In a derivative suit, shareholders are not required to give security for costs, and the court is empowered to award costs to the shareholder in appropriate cases whether he wins or not.[43]

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[38] See CBCA ss. 239(1) and 238.

[39] See CBCA s. 239(1).

[40] See CBCA s. 2392(2)

[41] See CBCA s. 242(1). Compare to the decision in *Beatty, supra* note 22, and the *obiter* in *Regal Hastings, supra* note 22.

[42] See CBCA s. 242(2). This has also altered the common position that an action will not be allowed if an independent organ of the corporation does not wish the corporation to proceed with the action. See *Smith v. Croft (No 2), supra* note 6 at 185-186.

The Canadian courts appear to have taken a liberal view of these statutory provisions combined with attempts to fill in some of the statutory gaps in exercise of the discretionary powers conferred on them by the statute. However, in trying to balance the interest of the shareholders on one hand, and the risk of opening a floodgate of unmeritorious litigation on the other, courts have sometimes provided inconsistent pronouncements. In addition, some grey areas still remain to be clarified.

Courts have worked to prevent strategic litigation by restricting the status of a suing shareholder. In *Jacob Farms Ltd.* v. *Jacob*,[44] it was held that for former shareholders, there must be a connection between the alleged wrong and the period when she was a shareholder. For present shareholders, the courts are willing to allow the action even if they became shareholders after the fact.[45]

The conditions for the grant of leave have been interpreted liberally. For notice, it is clear that it need not be too technical. Therefore, where two letters were sent by the shareholder's lawyer to the chairman of the company, this was held to be sufficient notice.[46]

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[43] See CBCA s. 242(3)&(4). This provision is a codification of the decision and opinion expressed in *Wallesteiner* v. *Moir* (No 2), *supra* note 30.

[44] (1992), 32 A.C.W.S. (3d) 549 (Ont. Gen. Div.).

[45] See *Palmer* v. *Carling O'Keefe Breweries* (1989), 67 O.R. (2d) 161 (Ont. Div.Ct.), at 169-170. This approach makes it possible for people to buy shares for the purpose of qualifying as a complainant under the Act. This in turn could create room for vexatious litigation. However, conditions for the grant of leave are capable of limiting this risk.

[46] See *Armstrong* v. *Gardner* (1978), 20 O.R. (2d) 648 at 652-653. (Ont.H.C.). See also, *Re Bellman and Western Approaches Ltd* (1981), 33 B.C.L.R. 45 (C.A.). Failure to specify every detail in the notice does not invalidate the notice if the notice is clear enough to state the demands and the course of action required. In *Re Northwest Forest Products*, [1975] 4 W.W.R. 724, Cashman L.J.S.C. at 734 stated: "no more would be required than that sufficient to found an endorsement on a generally endorsed writ of summons."

The areas the court has had some difficulties dealing with are the requirement of good faith and the interests of the corporation. In *Re Northwest Forest Products,* [47] directors were sued for sale of assets of the company including land at an undervalue. There was evidence that no other bid had been sought by the directors, nor had there been any appraisal of the land. The court, in granting leave to the shareholder, held that to prove that it is *prima facie* in the interest of the corporation, an applicant is not expected to prove a *prima facie* case. It was sufficient to adduce evidence to show that it was in the interests of the corporation that leave be granted. This is not different from the principle formulated in the Ontario case of *Re Marc-Jay Investments Inc. and Levy*[48] that leave should be granted where the action is not frivolous or vexatious.

Perhaps surprisingly, judges tend to consider the issue of ratification by shareholders as an issue for consideration in the grant of leave.[49] In *Re Northwest Forest Products,* for example, the court held that it would not take the ratification of the director's wrong conduct into account because the proceedings of the relevant shareholders' meeting were not clear. The provisions of section 242(1) is tolerably clear: it states that "evidence of approval by the shareholders may be taken into account by the court in making an **order** under section . . . 240 . . ."[50] Section 240 states that "[i]n connection with an action brought or intervened in under section 239, the court may at any time make any order it thinks fit including . . . . " (four specific orders are listed).

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[47] *Ibid.* Although the decision was based on the British Columbia *Companies Act,* R.S.B.C. 1973, c. 18, which uses the words "*prima facie* in the interests of the corporation" in s. 222(3)(c) (the equivalent of s. 239(2)(c) of the CBCA), the reasoning of the court is helpful in understanding the CBCA as well.

[48] (1974), 5 O.R. (2d) 235 (H.C.) at 237. See also *Re Bellman, supra* note 46. D.H. Peterson expressed his support for this test of not being frivolous or vexatious because it addresses the issue whether the suit is relevant to the advancement of the interest of the corporation without actually going into the merits of the case. See D. H. Peterson, *Shareholder Remedies in Canada* (Toronto: Butterworths, 1989) at 17.25 Para. 17.43. See also M. Baxter, "The Derivative Action under the *Ontario Business Corporations* Act: A Review of Section 97" (1982) 27 McGill L.J. 453 at 462-463.

[49] This appears to be the approach of scholars too. See F.H. Buckley, "Ratification and the Derivative Action Under the Ontario Business Corporations Act" (1976) 22 McGill L.J 167 at 179. See also J.A. VanDuzer, *The Law of Partnerships and Corporations* (Concord: Irwin Law, 1997) at 255, that "shareholder approval may still be taken into account by a court, however, in deciding if leave to commence a derivative action should be given."

It is obvious from the provision of the sections that ratification should only become an issue when the action has been commenced or continued, not at the preliminary leave application stage. The Act is also clear on the conditions for the grant of leave stated in section 239(2) and those do not include the issue of ratification. The danger of considering ratification as a factor for the granting of leave is to revert to the common law distinction between ratifiable and non-ratifiable conduct as a condition for the derivative suit action.

The fact of the ratification may become relevant in deciding the "interests of the corporation", but there is a difference. In considering the interests of the corporation, what the court should consider is not ratification as a fact but the reasons behind the ratification, to establish whether the suit is in the interests of the corporation. This is in accord with the Dickerson Report's approach, which is to make ratification an "evidentiary issue, which in effect compels the court to go behind the constitutional structure of the corporation and examine the real issues." [51] This is a thin but necessary distinction to avoid clouding the new statutory derivative action with the undesirable rubrics of the common law derivative action.

The courts have declared that the statutory derivative action has erased the common law derivative action,[52] some of the features of the common derivative action still subsist. The statutory derivative action is only a procedural matter because the doctrine of corporate legal personality still remains. Therefore, there is still a distinction between a wrong done to the shareholder as a person and a wrong done to the corporation. An action for a wrong done to the corporation can only be commenced with leave of court. For example, in *Farnham v. Fingold,*[53] in a personal action for wrongful sale of shares by directors of a corporation, the court held that the wrong is to the corporation and could only be commenced by a derivative action with leave of court.[54]

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[50] Emphasis mine.

[51] See the Dickerson Report, *supra* note 3 at 164 Para. 487.

The personal/ corporate right distinction has been well litigated in the "audit cases". In *Hercules Managements Ltd. v. Ernest Young,*[55] the Supreme Court of Canada held that shareholders cannot institute a personal action for negligent misrepresentation in the audit report to the corporation, because the negligence is a wrong done to the corporation.[56] But in *Twiggco Financial Ltd* v. *Peat Marwick*[57] the Ontario court had earlier allowed a similar suit by the shareholders. This is however distinguishable from *Hercules* on the ground that in *Twiggco*, the audit firm knew that the shareholders would rely on its statement and this therefore created a duty of care also to the shareholders, breach of which entitled them to sue.

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[52] See *Shield Dev. v. Snyder* (1975), [1976] 3 W.W.R. 44 at 52 (B.C.S.C.). But the courts still draw wisdom from the common law cases for guidance. In *Turner* v. *Mailhot* (1985), 50 O.R. (2d) 561 at 564-567. (H.C.), on an application for cost by the applicant, the court awarded 1/2 of the incurred and future expenses to the applicant in accordance with *Wallesteiner* v *Moir No 2, supra* note 30.

[53] [1973] 2 O.R. 132 (C.A.).

[54] See also *Vadeko Int. Inc* v. *Philosophe* (1990), 1 O.R. (3d) 87 (Ont. Gen. Div.). Here, the court, instead of dismissing a suit commenced without leave, granted the plaintiff's motion for leave nunc pro tunc.

[55] (1997), 146 DLR (4d) 577 (S.C.C.).

[56] This was in line with the Ontario General Division earlier decision in *Roman Corp.* v. *Peak Marwick Thorne* (1994), 12 BCL (2d) 1 (Ontario Gen.Div.).

[57] (1994), 12 B.C.J. (2d) 1.

The issue in these cases was not whether or not the shareholders could sue on behalf of the corporation, but whether or not the audit firms owed any duty to the shareholders, which when breached, entitled them to sue in a personal action.[58] This demonstrates that the statutory derivative action does not cancel the proper plaintiff rule of *Foss* v. *Harbottle*. The proper plaintiff rule is not only a rule of corporations law but derives from the more general pronouncement that only the person to whom a wrong is committed can sue. The statutory derivative action only provides a procedural requirement whereby the complainant establishes the necessary standing to proceed with the proposed derivative action.

Although this distinction may cause some confusion, the confusion cannot be compared to the confusion under the common law. Further, due to the decision in *Goldex Mines* v. *Revill*,[59] a shareholder can combine personal action and derivative action in the same suit, although leave is required for the derivative aspect of the suit.[60]

In spite of the greater clarity provided by the statutory derivative action, scholars have expressed disapproval of certain judicial pronouncements.[61] This was predicted by Professor Welling who stated that the beauty of the statutory derivative action, "lies in its simplicity; a few strokes of the legislative pen effectively disposed of one of the most consistently troublesome areas of corporate law. Its only true enemy may be law professors..."[62] Ironically, Welling in the same chapter criticizes the statute for two reasons First, he contends that the power of the court to order payment to the present shareholders, of any amount adjudged payable by the defendant to the corporation is not appropriate. In the case of former shareholders, this is defensible as a form of incentive to sue, but for the present shareholders, it amounts to a declaration of dividend.[63] Second, he criticizes the wide discretionary powers given to the court because he believes it creates uncertainty.[64]

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[58] The result would have been different if the plaintiffs/shareholders were seeking for leave to sue on behalf of the corporations. In all the cases, the actions were to enforce what they considered to be their personal rights. For instance, in *Burt* v. *Mclaughlan* (1993), 133 A.R. 91 (Alta. Q.B.), the rights of the defunct Canadian Commercial Bank against directors and auditors had been settled, but the shareholders went ahead to sue the same auditors and directors for loss resulting from devaluation of their shares. The court rightly dismissed the suit because the auditors and directors do not owe any duty of care to the shareholders privately other than their duty to the corporation.

[59] (1974), 7 O.R. (2d) 216 (Ont. C.A.).

[60] *Ibid.* at 226. D.H. Peterson has also suggested that if shareholders are not sure whether an action is personal or derivative, they should apply for leave. See D.H. Peterson, *supra* note 48 at 17.36, para. 17.69.

The views of Professor Welling are understandable but may not be totally justifiable. The order for payment of the judgment sum or part of it to the present shareholders would depend on the circumstances of the case. As rightly envisaged by the Dickerson Report, this might occur, for instance, where the the corporation has been dissolved or liquidated, or is in the process thereof, at the time of the suit.[65]

Other writers question not the discretionary powers of the court as statutorily provided, but the courts' exercise of those powers in satisfaction of the leave requirement for derivative actions. According to Dennis H. Peterson, good faith lacks any objective test. In addition, the attitude of the court on the good faith requirement is inconsistent and unpredictable; in his view, the good faith requirement is unnecessary. As long as the interests of the corporation requirement is met, he argues, it should be of no consequence whether the applicant has good faith or bad faith.[66]

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[61] For general discussion of the judicial decisions on the derivative action in Canada, see D.H. Peterson, *ibid.* at 17.1.

[62] See B. Welling, *supra* note 1 at 525 - 526. Footnote omitted.

[63] *Ibid.*

[64] *Ibid.*

[65] See the Dickerson Report, *supra* note 3 at 161 para. 483.

Reflecting the same distrust, M.A. Maloney also criticizes the approach by the courts and suggests a reconsideration of the requirement of good faith.[67] She feels that the attitude of the courts on the good faith requirement is overzealous and unnecessary.[68] She also questions the requirement of the interests of the corporation by raising four questions: Who is the company? What criteria should be used to determine the interests of the company? How much evidence should be shown at the preliminary stage, and who should make the decision? She supports the requirement in *Re Bellman supra, and Re Mac Jay Investments supra* that the action not be frivolous or vexations, and criticizes those decisions which apparently stray from that principle.[69]

Although Maloney supports some restrictions on the derivative action, she demands a lower standard of proof on the standing issue. This standard can be achieved by a macro view of the interests of the corporation, not the interest of a majority of the shareholders. She suggests that the more important question the court should ask is:

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[66] See D.H. Peterson, *supra* note 48 at 17.23-17.24 para 17.40

[67] See "Whither the Statutory Derivative Action" (1986) 64 Can. Bar Rev. 309 at 317-321.

[68] *Ibid.* at 320. For instance, he questions the decision in *Abraham* v. *Prosoccer* (1980), 31 O.R. (2d) 475 (H.C.), where the court held that the suit was not in good faith because the matter was being settled.

[69] *Ibid.* at 326-330. *Re Besenski* (1981), 15 Sask.R.182 (Q.B.) at 185, is given as example of such deviation.

> Have duties been breached or has a wrong been done to the corporation? If the answer is in the affirmative, the question of whether the action should be allowed to be commenced in terms of time and expense should relate to the severity and extent of the alleged wrongdoing, not to possible prejudice of present shareholders or the corporate interest very narrowly defined.[70]

It is submitted that the criticisms expressed above do not identify the problems in the statutory provisions, rather than with the judicial attitude.[71] It is a fact that the derivative action has immense benefits for managerial accountability.[72] There is, however, a need for its limitation. The need touches on both the interest of the corporation as a legal person and the shareholders as the ultimate beneficiaries of corporate progress. The bitter and excruciating effects of an unguided derivative action is well described by Alan F. Bartlett, one of the defendants/directors in the Newman case *supra* in *Power, Prejudice and Pride* thus:

> The lesson to be learnt was clear. Pursuit of justice for its own sake is exorbitantly expensive. Those who set themselves up as its champions must be prepared to pay the cost of combat. But, as in war, the fall-out cannot be confined to the protagonists. Others will be hurt...companies lost their leadership...shareholders lost their investment. Employees lost their jobs. [73]

As reasoned in the Dickerson Report, and correctly too, one of the main reasons for the requirement of good faith and interests of the corporation is to prevent unmeritorous and other strategic suits brought only as a private vendetta or for its nuisance value.[74] For this reason alone, it would not be the best approach to remove the good faith requirement as suggested above. Even the approach suggested by Maloney as the test of the interests of the corporation, on its own, is too narrow. If the important question is, as he said, "the severity and extent of the alleged wrongdoing" and not the possible prejudice to the shareholders or the corporation, (if by prejudice he means ill-effects), absurd results could be produced. What does it profit the shareholders to take a derivative action to remedy directors' breach if the effects of such action would be the total collapse of the corporation?

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[70] *Ibid.* at 329.

[71] This brings into question the role of the judiciary in terms of its specialization and ability to handle corporate litigation efficiently.

[72] See Part VI. below.

[73] (Ashford Press, 1987) at 94.

[74] See the Dickerson Report, *supra* note 3 at 161, para. 482. In American corporate jurisprudence, such suits are referred to as "strike suits". See *Surowitz* v. *Hilton Hotels Corp.* 393 U.S 363 (1966) at 371, where the U.S. Supreme Court defined the "strike suit" as a suit brought "by people who might be interested in getting quick dollars by making charges without regard to the truth so as to coerce corporate managers to settle worthless claims in order to get rid of them."

Finally and importantly, there should be no formulation of rigid principles on what is required to form good faith or the interest of the corporation. Such cases should be decided on their own merit and on their own facts.

V. The New Derivative Action under Nigerian Company Law

Nigerian company law was totally imported from England.[75] As a result, the rule in *Foss* v. *Harbottle* is well rooted in Nigeria Company Law, together with its incapacitating effects on the shareholder's action to seek a remedy for wrongs done to the corporation.

In 1988, the Nigerian Law Reform Commission, in a review of Nigerian company law, sufficiently acknowledged the shareholder's dilemma. It noted that the four exceptions under which shareholders could sue to redress a wrong to the company were inadequate. One such defect is the fact that shareholders cannot institute a personal action for breach of directors' duties because of the hurdles posed by the rule in *Foss* v. *Harbottle*. In their words, the result is that "directors can continue to fritter away the company's assets through negligent loans, for instance, and no action would lie."[76]

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[75] See J. O. Orojo, *Company Law and Practice in Nigeria* 3rd. ed. (Lagos: Mbeyi and Ass., 1992) at 16 - 20.

Furthermore, the Law Reform Commission also recognized the problems of enforcing the contract created by the Memorandum and Articles of Association.[77] It recommended that each member should have a *prima facie* right to enforce by injunction and declaration, any breach of duty, whether the breach affects him alone or other members.[78]

However, the Nigerian Law Reform Commission weighed the advantages of the rule in *Foss* v. *Harbottle*, which is to prevent vexatious litigation and to give the majority enough room to manage the company, with the disadvantages. It recommended the retention of the rule, but in a codified form for reasons of simplicity. It further recommended a restriction of the rule by codifying two other exceptions referred to below. Furthermore, it also recommended the adoption of the Canadian statutory derivative action as in the CBCA.

The Nigerian *Companies and Allied Matters Act*, 1990 (hereinafter "CAMA") fully implemented these recommendations. Section 299 provides "subject to the provisions of this Decree, where irregularity has been committed in the course of a company's affairs or any wrong has been done to the company, only the company can sue to remedy that wrong and only the company can ratify the irregular conduct." Section 300 states the exceptions. In s. 300, shareholders have the right to apply to court, and " by injunction or declaration restrain the company from the following-"

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[76] See Nigeria Law Reform Commission, *Working Paper on the Reform of the Nigerian Company Law* Vol.1 (Review and Recommendations) (hereinafter "Nigerian Review and Recommendations) at 235. The Commission also noted the decision in the *Daniel's case supra*, note 17 (on the need to make directors who benefit from their negligence liable), and *Alexander* v. *Automatic company*, [1900] 2 Ch. 56, where the court frowned at directors profiting from their own negligence; due to the precarious nature of these cases, it recommended the codification of the idea underlying the decisions.

[77] *Ibid.* at 232 -236.

[78] *Ibid.* at 231 - 235.

- (a) entering into any transaction which is illegal or *ultra vires*;
- (b) purporting to do by ordinary resolution any act which by its constitution or the Decree requires to be done by special resolution;
- (c) any act or omission affecting the applicant's individual rights as a member;
- (d) committing fraud on either the company or the minority shareholders where the directors fail to take appropriate action to redress the wrong done;
- (e) where a company meeting cannot be called in time to be of practical use in redressing a wrong done to the company or to minority shareholders; and
- (f) where the directors are likely to derive a profit or benefit, or have profited or benefited from their negligence or from their breach of duty.[79]

In addition, s. 303(1) of the CAMA provides the equivalent of the Canadian statutory derivative action. In s. 309, it gives standing to a registered holder, beneficial owner, former registered holder or beneficial owner of a share to apply to court for leave to bring an action in the name and on behalf of the company, intervene to prosecute, defend or discontinue any action on behalf of the company.[80] Section 303(2) stipulates four conditions which must be established for grant of leave by the court. These are:

- (a) the wrongdoers are the directors who are in control, and will not take necessary action;[81]
- (b) the applicant has given reasonable notice to the directors of the company of his intention to apply to the court . . . [and] the directors of the company do not bring, diligently prosecute or defend or discontinue the action;
- (c) the applicant is acting in good faith; and
- (d) it appears to be in the best interest of the company that the action be brought, prosecuted, defended or discontinued.

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[79] The full text of the Nigerian provisions on the derivative action is attached here as Appendix A.

[80] As in the Canadian derivative action, others entitled to bring the derivative action are directors and officers of the corporation, the creditors, the Corporate Affairs Commission (equivalent of the Corporate Registry in Canada), and any other person that the court deems is a proper person to bring the application. But unlike the CBCA provisions, it does not include the shareholders of a subsidiary. See CBCA s. 238.

[81] This "wrong-doer control" requirement is not required under the CBCA. See the table of comparison of the provisions of the derivative action in Canada and Nigeria at Appendix C.

The court is given wide powers under s. 304 to make appropriate orders such as the orders listed in the section.[82]

As seen from the provisions of s. 299 of the CAMA, Nigerian company law appear to have codified the common law principles in *Foss* v. *Harbottle* concerning the proper plaintiff and the majority rules. From these provisions, several issues arise. First, are the exceptions provided in s. 300 and the derivative action described in s. 303 supplementary to each other or do they provide for separate causes of action? From the wording of the sections and the common law background, the two sections would seem to clearly provide for two separate causes of action. While s. 300 provides for a personal action by the shareholder, s. 303 provides for an action in the name and on behalf of the company -- that is, the proper derivative action.

This distinction is relevant for both procedural and substantive reasons. In the context of the personal action provided under s. 300, a shareholder can sue in his or her name and does not need leave of court, neither is it necessary to join the company as a plaintiff. Second, on the clear words of the statute, a shareholder can only apply for an injunction or a declaratory relief under s. 300. Therefore, if a shareholder applies for a money judgment or other remedies outside the declaratory order or injunction, the shareholder cannot institute an action under s. 300 even if the facts forming his action fall within the six exceptions.[83] Note too that an applicant suing in a personal action under section 300 may be required by the court to give security for costs.[84]

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[82] The four specific orders that the court could make both under the CBCA and the CAMA are exactly the same. See the CAMA s. 304(2) and CBCA s. 240. The only difference concerns money adjudged payable to former or present shareholders of the company. Under the CBCA, the shareholders of the subsidiary also can seek standing.

[83] This was so even at common law. See *Smith* v. *Croft* (No 2), *supra* note 6.

In short, the exceptions under s. 300 do not add anything to the common law exceptions to the rule of *Foss* v. *Harbottle*. The exceptions (a) - (d) were stated in *Edwards* v. *Halliwell*;[85] the exception (e) was also proposed in *Hodgson* v. *NALGO*[86] while the exception (f) was also accepted in *Daniels* v. *Daniels*.[87] Apart from the fact that the old problems remain, new problems may also have been created by such codification.

The old defects which have been carried into the new provisions are not only in the restrictions in the relief available: limitations on the shareholder's right to institute a personal action under the exceptions appear to have been carried into the statute. The first exception may be obvious enough, that the shareholder can apply in a personal action to restrain any *ultra vires* or illegal conduct. Similarly, exceptions (d), (e), and (f) may not also be difficult to identify. The problems with the exceptions are that they may not be of any use for shareholders of public companies or very large private companies who are not involved in management. The ability to restrain an intended fraudulent act, or negligent act from which directors will benefit depends on an inside knowledge of the day to day running of the company. For shareholders whose only contact with the company is the general meetings and the Annual Report, this would be of no use.

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[84] See the CAMA s. 301(4)

[85] *Supra* note 8 at 1066, per Jenkins, L. J.

[86] 1972] 1W.L.R. 130 at 139-140 (Ch.). This was an extension of justice factor by which the common law judges attempted to reformulate the rule in *Foss* v. *Harbottle*. See also *Edokpolor* v. *Sem Edo Wire Industries*, [1984] 7 S.C. 119 (Nig. S.C.).

[87] *Supra*, note 17 at 80.

The greater problem is with the exceptions (b) and (c). The question here is whether exception (b) confers on the shareholder the right to sue for any act which requires a special resolution which the company has done or intends to do with ordinary resolution or merely a prejudicial one? The difficulty in exception (c) revolves around the question: of which are the personal rights of the shareholder and which are the rights of the company? It is certainly well known that at common law, whether the breach of the special resolution requirement is a breach of the shareholder's right *qua* member or rather it is a breach of the company's right has resulted in considerable controversy. With respect to breach of a company's right, the shareholder could only sue by proving fraud on the minority.[88]

Based on the Nigerian Law Reform Commission's Report,[89] when analyzed in isolation, the construction of s. 300 (b) would be that a shareholder can sue in a personal action for any transaction which requires a special resolution but which has been carried out by ordinary resolution. However, this would not appear to be the correct interpretation in view of the provisions of s. 299 of the Act concerning the company's sole right of action. The private/corporate right distinction still exist in this regard as applied at common law.[90]

VI. The Problems of Majority Rule

As earlier noted, the intention of the Nigerian law makers was to retain the rule in

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[88] See *Edwards* v. *Halliwell, supra* note 8. See also *Wood* v. *Odessa,* [1889] 42 Ch.D 636 (Ch.) and *Salmon* v. *Quinn and Axten,* [1909] 1 Ch. 311. See also R.R. Pennington, *supra* note 5 at 657, and the critique of Professor Wedderburn *supra,* note 13 and 17.

[89] *Supra* note 76 at 232.

[90] This is fully discussed in Chapter Five.

Foss v. *Harbottle* in a codified form. On the other hand, they also intended to provide wider access for shareholders by extending the exceptions to the rule, and by providing a statutory form of derivative action like that of the CBCA.

The intention of the law makers may not have been fully achieved. The new provisions are not a precise codification of *Foss* v. *Harbottle* nor do they properly reflect the Canadian derivative action. Furthermore, by virtue of ambiguous, overlapping and undefined requirements, Nigerian company law has not only fortified the unfortunate limitations of *Foss* v. *Harbottle*, it may also have created additional restrictions to shareholders' derivative action.

Regrettably, the Nigerian judiciary may not have had sufficient opportunity to explore critically the scope and proper construction of the new provisions. Academic analysis is also not forthcoming.[91] Given the genesis of the Nigerian derivative action, it is profitable to look to the Canadian decisions for guiding precedents. However, an addition to the Canadian requirements -- that the wrongdoers are the directors who are in control and will not take necessary action -- also calls for construction of the Nigerian Act on its own.

At common law, leave was not required to institute a derivative action. The decision in *Prudential Insurance* only decided that whether or not the claims of the applicant fell within the exceptions is a matter be decided as a preliminary issue. Accordingly, this was not leave to sue but leave to continue the action.

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[91] The most authoritative text on Nigerian Company Law -- J.O.Orojo, *supra* note 75 -- first published in 1976, in its third edition, published in 1991, incorporates the provisions of the CAMA. With respect to the learned author, who incidentally, was the chairman of the Law Reform Commission that drafted the CAMA, the third edition of the book was written in such a hurry that it does not provide a full analysis of the provisions of the new law in this area. Another authoritative book -- E O. Akanki, ed., *Essays on Company Law, (Lagos: University of Lagos Press, 1992)*, (Akanki is another leading scholar on Nigerian Company Law) is also not very helpful here. Its chapter on " Protection of the Minorities in Companies" deals only with the oppression remedy.

The requirement of "wrongdoer control" both as framed now and as it existed at common law are likely to be problematic. This is because the common law control requirement has expanded beyond voting control of the company.[92] Jessel M.R. formulated this clearly in *Russel* v. *Wakefield Waterworks Co:*

> [i]t is not necessary that the corporation should absolutely refuse by vote at the general meeting, if it can be shewn either that the wrong-doer had command of the majority of the votes, so that it would be absurd to call the meeting; or if it can be shewn that there has been a general meeting substantially approving of what has been done; or if it can be shewn from the acts of the corporation as a corporation, distinguished from the mere acts of the directors of it, that they have approved of what has been done, and have allowed a long time to elapse without interfering, so that they do not intend and are not willing to sue. In all those cases the same doctrine applies, and the individual corporator may maintain the suit.[93]

Professor Orojo supports the view that Jessel M. R.'s practical approach to the control requirement is also present in the Nigerian statute. But, if the intention of the Act is to reflect this liberal approach, then what is the purpose of the requirement of notice to the directors? If the shareholder notifies the directors and they refuse to sue, this on its own would constitute control. Therefore, in this respect, the requirement of notice and control amounts to the same thing. The notice is to establish a refusal to sue by persons in authority who had the obligation to sue. Second, even if those in authority are not the wrongdoers, their refusal to sue where necessary constitutes a wrong. On the other hand, if the wrongdoers are the directors in control, then it is not necessary to give notice because, the directors being the wrongdoers, would not sue themselves. What therefore is the necessity for the notice requirement when the wrongdoers are in control? In the Canadian case, even where there is no requirement that the wrongdoer must be the directors who are in control, some judicial pronouncements support the view that notice is not necessary where the directors are the wrongdoers.[94] Therefore, the requirement of notice and wrongdoer control at the same time may be a surplusage.

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[92] Although the extent to which the courts were willing to take this requirement is still not clear.

[93] *Supra* note 18 at 482.

Another problematic issue arising from the control requirement is its wording. According to s. 303(2): "No action may be brought under subsection (b) of this section, unless the court is satisfied that: (a) the wrongdoers are the directors who are in control, and will not take necessary action." Does the section create three separate requirements, that is: (1) the wrongdoers are the directors, (2) they are in control, and (3) they will not take necessary action? If the refusal to take necessary action amounts to control as was expressed in the *Wakefields case* discussed earlier, then there would have been no need to make express requirement for control in the section. It would have sufficed to have stated "the wrongdoers will not take necessary action." It would also amount to the same thing if stated in the alternative: "the wrongdoers are the directors who are in control."

The importance of this distinction lies in the fact that, if interpreted as three separate heads of requirements (as the section literally tends to show), it would lead to problems of definition again, of what is "control, and, who is the"wrongdoer". It would also create the problem of looking for separate facts to satisfy the three different requirements. In addition, it would raise the issue of the wrong to the minority. Furthermore, is the word "wrongdoer" used in relation to the minority as was required at common law or does it mean any wrong to the company in general?

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[94] See D.H. Peterson, *supra* note 48 at 17.20, para 17.38.

It is submitted that the only way the section can be meaningful is to interpret it as providing a single requirement. If so, the word "wrongdoer" is only a modifier to word "control". Therefore the salient requirement in the section would be "a wrong - doing director" because the refusal to sue in appropriate cases is wrongful and the ability to refuse to sue is only because he is in control. For insider wrongs, this would pose little problem. But for outside wrongdoers, this would create further difficulties. (1) Do directors who refuse to sue the outside wrongdoers, thereby become themselves "wrongdoers"? Second, what if the refusal to sue is in the best interest of the corporation?

At common law, these matters were not particularly difficult since the fraud on the minority requirement was a standard of measurement. If the refusal to sue constituted fraud on the minority, the shareholder was entitled to sue on behalf of the corporation. Under the provisions of s. 303, fraud on the minority is not required. Therefore, correctly interpreted, this new derivative action applies to all wrongs done to the company whether it is a fraud on the minority or not, when it is established that the directors are the wrongdoers and in control.[95]

For outside wrongdoers, whether or not the refusal of the directors to sue itself made them wrongdoers would depend on whether the decision not to sue was made in the best interests of the corporation. Here, the court is to review the efficiency of the business judgment of directors. If the directors are not the wrongdoers, and the refusal to sue is supported by the majority as being in the best interest of the corporation, it may at the same time be unfair to the minority shareholder. Here, the CAMA, in s. 305 provides:

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[95] Note that the "fraud on the minority" requirement of s. 300 is in respect of shareholders' personal actions.

> An application made or an action brought or intervened in under section 303 of this Decree shall not be stayed or dismissed by reason only that it is shown that an alleged breach of a right or a duty owed to the company has been or may be approved by the shareholders of such company, but evidence of approval by the shareholders may be taken into account by the court in making an order under section 304 of this decree.

The above provision is the equivalent of s. 242(1) of the CBCA. Taken on its plain meaning it is stating that ratification is no longer a bar to the shareholders' derivative action. To this extent *Beatty* and *Regal Hastings* have been statutorily overruled. This interpretation is also consistent with the codification of directors' fiduciary duties, and their duties of skill and care.[96] Further support for this approach is the provision that the liability of directors cannot be excluded by any agreement by the company.[97]

Notwithstanding, the above interpretation is incorrect. The Nigerian Act in s. 299 re-establishes the majority rule in *Foss* v. *Harbottle*, by stating in part "where...irregularity has been committed in the course of a company's affairs or any wrong has been done to the company...only the company can ratify the irregular conduct." This provision clearly re-enacts the majority rule in *Foss* v. *Harbottle* which as explained in *Edward* v. *Halliwell*,

> where the alleged wrong is a transaction which might be made binding on the company or association and on all its members by a simple majority of the members, . . . if a mere majority of the members of the company or association is in favour of what has been done, then *cadit quaestio* [the question is at an end]. . . . On the other hand, if a simple majority of the members of the company or association is against what has been done, then there is no valid reason why the company should not sue.[98]

It was on the basis of this principle of majority rule that the court allowed ratification of some breaches like the *Beatty's case*, and also held that if an independent organ of the company does not wish to litigate, then that was the end of the matter. Ratification would only be disallowed if the wrong constituted a fraud on the minority.

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[96] CAMA s. 279 - 287.

[97] CAMA s. 279(8).

[98] *Supra* note 8 at 1066-1069.

What then is the scope and proper position of s. 305 of the CAMA? Has this provision effectively abrogated the majority rule in the Nigerian Company Law? Professor Welling, commenting on the equivalent provision in s. 242(1) of the CBCA opined that, with the new provision, "[t]he corporate person is not to be identified with any majority of the shareholders, however overwhelming."[99]

The Nigerian provision could be looked at in two ways. First, it could be argued that the majority rule principle has been abolished. This may not be true. The express retention of the principle in section 299 makes this view doubtful. On the other hand, it could also be argued that s. 304 has only codified the common law principles *simplicita.* At common law, even though the majority can ratify corporate wrong, they could not ratify *ultra vires* transactions,[100] and they could not also ratify acts which constitute a fraud on the minority.[101] Therefore, it could be argued that, the new provision only empowers the court to take into consideration the ratification, that is, to consider whether an act was a ratifiable conduct at common law in allowing a derivative suit. This second view is also questionable. This is because the discretion of the court to consider whether the wrong act has or will be approved by the majority is not in respect of whether or not to allow the applicant/shareholder to sue, it only comes into play in deciding the type of order to make under s. 304. These orders under section 304 becomes applicable when an action has already been commenced or intervened upon and not on an application for leave. The court cannot deprive an applicant of leave to sue on the ground that the conduct has been ratified. The court can only consider such ratification in making orders for the conduct or control of the action, to whom the adjudged money should be paid or payment of legal fees to the applicant by the company. This is clear from the wording of the section that ratification may be taken into consideration "in making an order under section 304."[102]

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[99] See B. Welling, *supra* note 1 at 541. See also J.A. VanDuzer, *supra* note 49 at 254 - 255.

[100] See *Smith* v. *Croft* (No 2), *supra* note 6.

[101] See *Cook* v. *Deeks*, *supra* note 10.

It is submitted that the provisions of s. 305 has overshadowed the majority rule stated in s. 299. The correct interpretation of ss. 303, 304 and 305 is that the determinant of the right of a minority shareholder to sue are the conditions stated in section 303(2). The majority rule as it relates to the derivative action no longer exists. The Nigerian courts should be bold enough to say that notwithstanding the provision in the second arm of section 299, that the majority rule as formulated in *Foss* v. *Harbottle* is dead.

Finally, the scope of derivative suit under the new Nigerian corporate law is wider than the common law derivative action, as the following analysis illustrates.

a. Directors Breach of Rights and Duties

At common law, an action could not be instituted for directors' negligence on the one hand,[103] and on the other, some breaches of director's fiduciary duty could be ratified. Under the new Act, both the director's fiduciary duties, and duties of skill and care are mandatory and cannot be "contracted out of." That is, liability for breach of such duties cannot be ratified.[104] Under s. 303, fraud on the minority is no longer the reason for directors liability, because the new cause of action applies, as stated in section 303, for breach of "any duty or wrong".

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[102] See CAMA s. 305.

[103] See *Pavlides* v. *Jensen, supra* note 12.

b. Irregularities in the Management of the Company

Irregularities constitute a wrong. As earlier argued, since s.305 has erased the majority rule, there is no reason why a shareholder cannot sue to recover any damage which a company suffers which arises from an irregular conduct. This may however be limited by the "best interests of the company" consideration for granting leave. The purpose of this section as stated by the Dickerson Report[105] on the equivalent section under the Canadian Act, is to prevent litigation for petty reasons.

c. Third Parties: Where third parties are the wrongdoers, the position is unclear because of the "wrongdoer control" requirement. On the one hand, the proper plaintiff rule as formed in the first part of s. 299 is prominent. Even though it has been argued that the majority rule has been eliminated, the requirement of "wrongdoer control" tends to support the view that a shareholder cannot sue a third party who is not a director and has no connection with the control of the company. For this reason alone the requirement of control is unhelpful and even harmful. If the provision of s. 303 is strictly construed, a shareholder may not be able to institute an action against any third party for this reason.

However, as also argued earlier, the refusal of the directors to sue the wrong party may constitute a wrong for which the directors could be sued. The third party could be joined as parties in the action. It is submitted that this is the only reasonable construction of s. 303 for action against third party if the provisions will not do more harm than good.

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[104] CAMA s. 279(8).

[105] See the Dickerson report, *supra* note 3 at 161, para. 482.

VII. Derivative Suits and Control of Managerial Abuse: Theory and Practice

The Canadian and Nigerian legislative reforms of the common law derivative action and the various academic critiques of the new procedure are aimed at lessening the hurdles in the shareholder's way in seeking a remedy for any wrong to the corporation. The debate about fault, and flaws, as well as about reform and liberalization of the derivative suit is only useful if it assists in making the derivative action a more effective tool in the hands of the shareholder. This whole matter of effectiveness in turn is a highly controversial issue, particularly when examined in the light of the social, economic and political milieu in Nigeria and Canada.

Different theories have been canvassed as justification for the derivative suits. Formulated in economic language, the agency costs of directors mismanagement and egocentric tendencies that result from the use of the corporate vehicle, and the inadequacies of the market control mechanism as a justification for the derivative suit is very convincing.[106] Flowing from the agency cost analysis is the argument that the different protective devices for the protection of shareholders centered around the corporate democracy has unsuccessfully provided any safeguard for minority shareholders.[107]

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[106] See J.D. Cox, "Compensation, Deterrence, and the Market as Boundaries for Derivative Suit Procedures" (1983-84) 52 Geo.Wash L. Rev. 745 at 746-748. See also I. Ramsay, "Corporate Governance, Shareholder Litigation and the Prospects for a Statutory Derivative Action" (1992) 15 U.N.South Wales L.J. 149 at 151-156.

Consequently, it is argued that the derivative suit is a useful tool because, as an alternative to market failure, it serves two useful functions. First, it deters managers who would otherwise have survived the effects of market control. Second, the derivative suit compensates shareholders who are victims of managerial abuse. Some writers weigh the effectiveness of the two roles and argue that the deterrent function is more effective.[108] J.C. Coffee and Donald Shwartz hold the view that the derivative suit is more adopted to the deterrent function because "it harnesses private enforcement resources and focuses its penalties on the individual rather than the corporation."[109] They are of the view that the compensatory functions are less effective because (1) shareholders are constantly changing; (2) the corporate injury is usually the same as the shareholder's injury, and (3) on a pro rata basis, the benefit to shareholders from the judgement sum is usually small.

On the other hand, both the compensatory and deterring role of the derivative suit have been questioned. Roberta Romano sees only a little benefit from the derivative suit, which is simply the fact that, by litigation and judicial decisions, the scope of permissible conduct is given. Therefore, proper identification of such rules enhances the contractual settings of the corporation.[110] From her empirical study of the derivative suits, she reveals that in America, the suits return less to shareholders than the oppression remedy. In addition, law suits are not a common occurrence for public companies, and there is no evidence of the deterring role of the suit.[111]

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[107] See E.O. Akanki, "Controlling the Vagaries of Democracy in Companies" (1988) 15 Nig. J. Contem. Law 111 at 124-130.

[108] See J.C. Coffee, Jnr. and D.E. Schartz, "The Survival of the Derivative Suit: An Evaluation and a Proposal for Legislative Reform" (1981) 81 Colum. Law Rev. 261 at 302-324.

[109] *Ibid.* at 305. It has also been suggested that based on the portfolio theory, the derivative suit serves a better deterring function because the cost of a particular derivative function may not be beneficial, but it will benefit the society in general. Therefore, shareholders who distribute their resources will profit more from the deterring effect of derivative suits. See, The American Law Institute, *Principles of Corporate Governance: Analysis and Recommendation* (Final Draft March 1992) (Philadelphia: ALI, 1992) at 601.

Apart from these doubts about the deterring and compensatory role, the usefulness of the derivative suit is also questioned by other practical considerations. It is contested that the derivative suit dampens the incentive to shareholders to monitor management.[112] This theory was formulated by Judge Richard Posner in the American case of *Cenco Inc.* v. *Seidman and Seidman.*[113] Here, management of the company had overstated inventories by which the company was able to get lower interest rates and acquire other corporations on favorable terms. The auditors of the company later discovered this misrepresentation but did nothing. In an action by shareholders who bought shares based on this fraud, the company paid $11m in settlement. Some other shareholders of the company also sued the auditors for this loss. The auditors successfully argued that the company initiated the fraud and benefitted from it. But in addition to acceding to the defense, Judge Posner stated, that "if the owners of the corrupt enterprise are allowed to shift the costs of its wrongdoing entirely to the auditors, their incentive to monitor their behaviors will be reduced."[114]

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[110] See R. Romano, "The Shareholder Suit: Litigation Without Foundation?" in R. Romano, ***Foundations of Corporate Law*** (New York: Oxford University Press, 1993) 170 at 179-180.

[111] See also D.R. Fischel and M. Bradley, "The Role of Liability Rules and the Derivative Suits in Corporate Law: A Theoretical and Empirical Analysis" (1985/86) 71 Cornell L. Rev. 261. Here, they assert that their study shows that successful derivative suits have a slight positive effect (1.60 average) on stock prices while court terminated derivative suits had a lightly negative effect(-0.19 average). It is therefore argued that if the derivative suit serves any use, the price of shares will significantly react to the institution or termination of the suit. The insignificant figures arrived at show that the derivative suit is not an important monitoring device for management misfeasance. But see K.E. Scott," The Role of Preconceptions in Policy Analysis in Law: A Response to Fischel and Bradley" (1985/86) 71 Cornell L.Rev. 299 at 304-309. This article suggests some inaccuracies in the Fischel and Bradley study.

[112] This is derived from the economic analysis of risk and loss in accident cases. As formulated by G. Calabresi, the party with the lowest cost to avoid the accident should bear the cost in tort cases. See ***The Cost of Accidents*** (Brown, 1970).

[113] 686 F. 2d. 449 (7th Cir.) at 455-456 (1982).

A stronger reason and perhaps the oldest attack on the derivative suit is that it fetters enterpreneurial discretion. Apart from the decision in *Foss* v. *Harbottle*, the courts at common law recognized the need to allow managers who are better trained and equipped to run the affairs of the company to do their work without undue judicial scrutiny.[115]

The derivative action places considerable authority in the courts to define the interests of the corporation and accordingly is out of favor with many academics. Franklie Gevurtz, for example, examined all the parties connected with the derivative action: the board of directors, the plaintiff/shareholder, the shareholders in general meeting and the courts. He concluded that none of the parties could be relied on to determine the interests of the corporation.[116] According to him, the independent directors, as a general feature of corporate management, are usually under great influence by the management and therefore cannot effectively judge this matter. The plaintiff/shareholder may have brought the action for a strategic litigation for his personal interest and again is unable to judge effectively the interests of the corporartion. Moreover, to get the shareholders in general meeting to decide the question may be prohibitively expensive. On the other hand, the court, even assuming that it has expertise, consumes time and resources to make its assessment of interest and this weighs heavily against the benefits.[117] In his opinion, the derivative suit can only be meaningful when brought upon the recommendations of a panel of provisional litigation directors.

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[114] *Ibid.* at 455.

[115] See *Overeno and Gurney* v. *Gibb* (L.R.5HL) 480 (HL).

[116] See F.A. Gevutz, "Who Represents the Corporation? In Search of a Better Method for Determining the Corporate Interest in Derivative Suits" (1984/85) 46 Uni.of Pittsburgh L.Rev. 265. See also Notes, "When Should Courts Allow Settlement of Duty-of-Loyalty Derivative Suits" (1996) 109 Harvard L. Rev. 1084.

In the United States, the use of the derivative suit for its nuisance value makes it unpopular among many scholars.[118] In all, the discouraging factor against the derivative suit is revealed by a cost - benefit analysis. The expansive evaluation done by Richard Smith, although not quantitatively stated, is persuasive.[119] In Smith's opinion, the exalted advantages of the derivative suit are superfluous when weighed against the agency costs. The high cost of defense and insurance paid for by the corporation, and at times, payment of the plaintiff's solicitor's costs, by the same corporation can obviously be expensive. These, in addition to other indirect costs, such as corporate operating inefficiency that results from the time spent by managers and directors in litigation, makes the agency cost less than the cost of the derivative suit. Smith also argues that the derivative suit does not effectively serve the deterring role since few derivative suits are tried in America.

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[117] In contrast to this, it is argue that advanced corporate jurisdictions like that of Delaware have a developed body of case law and experienced judges that make it easy for them to make this decision. See R. Romano, *The Genius of American Corporate Law* (Washington, D.C: A.E.I Press, 1993) at 37-44. But the Delaware decision in *Smith* v. *Van Gorkam*, 488 A.2d. 858 (Del.SC 1985) is significant in this respect. Here, directors of Trans Union, were held liable for breach of their duty of care because their decision to sell the company (notwithstanding the sophistication of the Board) was not an informed decision. This decision has been heavily criticized: Ziegel, for example, raises several problems such as the effects of the decision on predictability and certainty which are vital for business planning. See J.S. Ziegel, R. Daniels and J.G. MacIntosh eds., *Cases and Materials on Partnerships and Canadian Business Corporations* (Toronto: Carswell, 1994) at 494. See also L.Herzel and L. Katz, "*Smith* v. *Van Gorkam*: The Business of Judging Business Judgement' (1986/86) 41 Business Lawyer 1187, B. Manning, "Reflections and Practical Tips on Life in the Boardroom After Van Gorkam" (1985/86) 41 Business Lawyer 1. In Delaware, the disastrous effects that the decision would have on business was immediately known and this was accordingly followed by legislation. As a result, under Delaware corporations law, corporations may exclude directors from liability for negligence. See Ziegel at 493-496.

[118] See the editors notes, "Extortionate Corporate Litigation: The Strike Suits" (1934) 34 Columbia L.Rev. 1308. See also, J.M. Smith "The Role of the Attorney in Protecting (and Impairing) Shareholder Interest: Incentives and Disincentives to Maximize Corporate Wealth" (1997) 47 Duke L.J. 161. Smith attributes the strike suit partly to the U.S. practice, especially, in Delaware where solicitors fees are not payable if conflicts are settled before it reaches the court. He therefore suggests that payment of cost on settlement before suit is filed will act as a disincentive to strike suits (at 169-184).

[119] See R.V. Smith, "Shareholders' Derivative Suits and Shareholders' Welfare: An Evaluation and Proposal" (1982/83) N.W.Uni.L.Rev. 856.

Based on the above reasons, Richard Smith calls for a total abrogation of the derivative suit. His argument is not based on the ineffectiveness of the derivative suit alone, but also on his belief in the contract and efficiency theories, and conviction that shareholders are better protected by the market control. According to him, "the contractual relationship between shareholders- investors and managers demands that litigation policy rest solely in the hands of management, not in the hands of shareholders, attorneys and courts."[120]

The arguments canvassed above against the derivative suit center on two issues: the strength of the market control mechanism and abuse of the derivative suit. These analyses are built around the United States corporate environment. Critiques such as Romano's and Smiths' can be easily dismissed by asking a simple question: In a corporate market dominated by small privately owned companies, where the shares of most of the companies are not publicly transferable, what mechanism should be used to redress wrongs against the corporation?[121] The same challenge could be reversed to question the theory formulated by Judge Posner. In very large companies, where the shareholders are resident in different parts of the company, how effective is the shareholders' supervision as a cure for managerial abuse? Obviously, the cost of communication and other associated problems make it difficult to effectively supervise managers. Therefore, Posner's argument that the derivative suit dampens incentive to supervise, is not tenable.

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[120] *Ibid.* at 905.

[121] Analysis of the state of market control in Canada and Nigeria is fully discussed in Chapter Two.

Above all, the differences in the corporate market in America, on one hand, and Canada and Nigeria on the other, call for different standards of measurement and appraisal of the usefulness of the derivative suits. Weaknesses in the American model created by national conditions do not usually apply to these two smaller countries. A study of the derivative suit in the context of the political and social environment would reveal generic problems that make the form of action a weak form of control.

In Canada, though no comprehensive empirical study is available, scholars record that there have been few cases against directors and officers and that the majority of claims are settled out of court for relatively insignificant sums.[122] This assertion could be interpreted in different ways. It could mean that the derivative action is not useful to shareholders in Canada. It could also be interpreted to mean that directors are deterred by its mere provision for corporate abuse. One conclusion that the assertion points to is that the abuse of the suit is not noticeable. The rarity of the suit is not a test of its usefulness. Being rare could be the result of its influence on directorial conduct.

In Nigeria, the picture is totally different. Though uncommon, the rarity of the derivative action is probably a reflection of its uselessness. In Nigeria, the role of *Foss* v. *Harbottle* in its crude common law form unfortunately was applicable until the enactment of the CAMA in 1990. The substantive and procedural hurdles were a major set back to its popularity. In addition, other social and economic factors mitigate against the use of the derivative suit.

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[122] See J.S. Ziegel, *supra* note 117 at 522.

In short, more than Canada and the United States, the agency costs that result from use of the corporate vehicle are pronounced in Nigeria. An ineffective communications, and slow judicial system combined with government representative on boards of private/government owed companies, create extra room for increased opportunistic behavior by directors and officers of companies.[123]

Unfortunately, the ability of the new statutory derivative action to regulate these opportunistic tendencies is limited. Both the deterrent and compensatory functions of the derivative action are totally defeated in the Nigerian situation. Furthermore, the cost of litigation in an impoverished economy and the delays in matters proceeding to court make this type of action unattractive to shareholders. More seriously, the level of corruption and the low level of law enforcement and regulation makes it easy for company directors and officers to manipulate the derivative action.

The possibility that the presence of this type of action may serve some deterring purpose is also not very likely. Since directors are capable of manipulating the system or since they know that it takes decades to get judgement, they can never be deterred by the fact that the CAMA contains a derivative action procedure. The portfolio argument that follows from the deterring role is not applicable to the Nigerian situation.

In public companies, in addition to the above problems, communication problems and the level of business sophistication of the shareholders make it difficult to properly identify managerial abuse when it occurs. In such an environment, the ability of the individual shareholder to remedy a wrong committed against a corporation by the derivative suit becomes practically questionable.

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[123] See Chapter 2.

A related problem is the questionable technical competence of Nigerian judges to make business judgements of commercial activities. Indeed, since directors' duties of skill and care are now codified, the right of shareholders to institute the derivative suit on behalf of the company covers directors negligence. Nigerian judges, however, may be ill-equipped to weigh managerial competence. This is a particularly difficult aspect of the Nigerian derivative action.

Not only do Nigerian judges lack the business sophistication and technical expertise of Delaware's judiciary,[124] Nigerian businesses are generally not operated in a sophisticated manner. Moreover, the economy itself is unstable. This means that business judgements taken by directors most times involve considerable indeterminacy and even factors that are external to known efficiency considerations. Another important reality is that directors of Nigerian companies are appointed not so much on the basis of business acumen but family and ethnic connection and representation of majority shareholders.

There is also a potential for the Nigerian derivative action to generate the American style "strike suits". This is another side of the coin that is shaped by the "Nigerian factor." The delays in court, the bureaucratic inefficiency, and the possibility of manipulating the derivative suits can be used by powerful shareholders and their solicitors to get injunctions and other declaratory relief at crucial times, such as a few days prior to the annual general meeting, in order to force the company to make settlements. With the new provision that gives the court power to award the cost of the litigation against the company -- whether the shareholder is successful or not -- may lead minority shareholders and legal practitioners to force the company to give out money in very petty issues.

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[124] See Chapter 2.

In all, it is submitted that in Canada, the rarity of the derivative suit does not suggest its uselessness but is more likely to reveal its deterring authority. In Nigeria, the directive suit may not be properly effective due to social and economic reasons. Notwithstanding, its presence in corporate law is still useful for the few shareholders that have the means, resources and stamina to employ it. As an addition to the body of corporate law remedies, the statutory derivative action enlarges the available resources to the shareholder. This alone makes it worthwhile since there is no evidence that it has generated nuisance suits. How effective the derivative action proves to be in Nigeria ultimately depends on the individual shareholder and the judiciary.

CHAPTER 4

OPPRESSION REMEDY AND THE PROBLEMS OF THE MINORITY

I. Introduction

As seen in Chapter 2, the minority shareholder occupies a peculiarly vulnerable position in the Nigerian corporation. She is constrained by her weakness in the corporate structure and the dominating influence of majority rule in corporate management.

Although it is claimed that the problems of the minority are universal,[1] it is equally accepted that different countries follow different paths in resolving these problems.[2] This chapter examines how Nigerian company law has attempted to regulate minority oppression by adoption of the minority oppression remedy. Part II traces the history of the oppression remedy in Nigeria (albeit in a cursory manner), to identify how defects made the "old" oppression remedy inadequate. Part III and IV survey the new approach to oppression taken by the Canadian and Nigerian judiciary and legislatures, with an express comparison taking place in Part V. This analysis is intended to set the stage for an exploration of the oppression remedy in the socio-economic and political context of Nigeria in Part VI. The chapter concludes with the author's apprehension that the Nigerian judiciary may be tempted to follow the approach to oppression taken by the judiciary in other jurisdictions such as Australia, England and Canada. If this were to occur it could lead to confusion of the principles initiated in the recent amendments to the Nigerian corporations legislation. Concomitantly, it could clog Nigeria's economic development by stultifying corporate growth and expansion. These potential setbacks are avoidable, however, if the Nigerian judiciary is persuaded to approach oppression with a "made in Nigeria" focus.

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[1] See S.K. Miller, "Minority Shareholder Oppression in the Private Company in the European Community: A Comparative Analysis of the German, United Kingdom, and the French "Close Corporation Problem" (1997) 30 Cornell Int. L. J. (No.2) 381 at 383 - 392.

[2] See G.M. Fung, "A Common Goal from Two Different Paths: Protection of Minority Shareholders in Delaware and Canada" (1993) 57 Albany L. Rev. 41 at 45 and 88-92.

II History of the Oppression Remedy in Nigeria

The history of the Nigerian oppression remedy illustrates a lack of legal responsiveness and localization. Even though the problems of the minority shareholder stand out visibly, the slavish adoption of English company law in Nigeria prevented the formulation of a company law of shareholders' remedies to address specifically the unique problems of the Nigerian minority shareholder.

The Nigerian *Companies Act* of 1968[3] (hereinafter the "1968 Act") provided for winding up of companies if, in the opinion of the court, "it were just and equitable that the company be wound up."[4] This winding up remedy was only suitable for a deadlocked situation among shareholders, where the only option was to break up the company. The defect of this winding up remedy lies in the fact that the remedy was extreme. Furthermore, courts required an applicant to show that he had a financial stake in the company and that the company had a surplus for distribution on winding up.[5]

However, to avoid the rigid approach of the winding up remedy, the 1968 Act also provided a second remedy in its s. 201. Section 201 provided an alternative remedy for shareholders by way of petitions to court for any order that the court may deem fit, if the applicant established that the oppressive conduct would be a ground for winding up, but that winding up the company would unjustly prejudice the applicant.[6]

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[3] Cap. 37 L/N 19.

[4] *Ibid.* s. 209(f).

[5] See *Re Farmat Produce and Shipping Line Ltd.* (1964), 2 A.L.R.Comm. 247 at 252 (Nig. H.C.).

Not surprisingly, these two provisions were only a replica of the s. 210 and s. 225 of the British *Companies Act*, 1948.[7] Ironically, by the time of their adoption in Nigeria in 1968, the oppression and winding up remedies had already proved inadequate in England because of the overly formulaic and strict approach taken by the English judiciary.[8]

In spite of this, Nigerian company law not only adopted the provisions, the Nigerian judges also followed the approach of the English judges. Therefore, the procedural and judicial problems that constrained the full realization of the British oppression remedy also developed in Nigeria. Some of these defects include the fact that the s. 201 remedy required an applicant to show that he was a member of the company and that he was being oppressed in his capacity as a member. This was the restrictive decision in the Nigerian case of *Ogunade*

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[6] For a comprehensive analysis of the winding up order and the oppression remedy under the Nigerian *Companies Act* of 1968, see E.O. Akanki, "Protection of the Minority in Companies" in E.O. Akanki, ed; *Essays on Company Law* (Lagos: University of Lagos Press, 1992) 276 at 276-286, and J.O. Orojo, *Company Law and Practice in Nigeria*, 3rd ed. (Lagos: Mbeyi & Associates, 1972) at 357 - 358.

[7] For detailed history of the winding up and the oppression remedy under British company law, see, The Law Commission (British), *Shareholder Remedies (Consultation paper No. 142*) (London: The Stationery Office, 1996) (hereinafter "Consultation Paper No. 142) at 56 - 61.

[8] First the Committee on Company Law Amendment ("The Cohen Committee") in 1945 recommended a strengthened minority shareholders protection because of the inadequacies of the winding up order. See *Report of the Committee on Company Law Amendment* (London: Her Majesty's Stationery office, 1945) at 95 para. 153. Section 210 of the *Companies Act*, 1948 was made based on its recommendations. Second, the Company Law Committee ("The Jenkins Committee") in 1962 made wide recommendations for reform of the oppression remedy although these were not immediately implemented. See *Report of the Company Law Committee* (London: Her Majesty's Stationery Office, 1962) at 78 para. 212.

v. *Mobile Farm,*[9] which followed earlier English decisions such as *Re Five Minute Car Wash Service Ltd.*[10]

Furthermore, the word "oppression" was strictly construed by the courts. For example, it was held in the case of *Scottish Co-Operative Wholesale Society Ltd.* v. *Meyer*[11] that the word oppression meant "harsh, burdensome and wrong." Therefore, in the interpretation by the courts, a single action could not meet these requirements, but only acts of a continuing nature.[12] In addition and as already noted, the applicant was required to establish that the oppressive conduct was a ground for winding up of the company but such winding up would prejudice his interest. This created an unnecessary linkage with the winding up remedy that further complicated applications for an oppression remedy.

Moreover, the classes of persons who could sue under the oppression remedy were very restricted. For instance, personal representatives or beneficial owners of shares were not covered. Also, negligence and mismanagement were not covered by the remedy.[13] All told, the hurdles and limitations were significant. As stated by Professor Akanki, "the usefulness of the provision as a weapon to be '*brandished in terrorrem*'[sic] particularly in negotiations was *ipso facto* severely limited."[14]

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[9] (1976), 2 FRCR 101 (Nig. H.C.). Here the Managing Director of a company who was removed was turned down because the position of managing director of the company is not part of the rights of membership of the company.

[10] (1965), [1966] 1 W.L.R. 745 at 751 (Ch.D.). See also *Elder* v. *Elder and Watson Ltd.* [1952] S.C 49.

[11] [1959] A.C. 324 at 342 (H.L.).

[12] See *Re Jermyn Street Turkish Baths Ltd,* [1971] 1 W.L.R. 1042 at 1058 - 1059 (Eng.C.A.).

[13] See *Re Five Minute Car Wash Service Ltd supra,* note 10 at 751 - 753.

The reasons for this inadequacy are easily ascertainable. The law was only a shipment from England, implanted into the Nigerian company law (if it was even a Nigerian law) without regard to the organizational behaviour of the Nigerian company. A consideration of the Nigerian corporate law context would have directed the law makers to construct an oppression remedy that could solve the problems of oppression in companies in the Nigerian environment. Such considerations would have included for instance, a realization that limiting the oppression remedy to only registered members was not practical. In Nigeria, where transfer of shares and subsequent registration sometimes takes up to one year,[15] and where devolution of shares sometimes remains undocumented, such beneficial owners of shares obviously would require protection. Lawmakers also would have determined that in a developing country like Nigeria, where the need for economic development is so pronounced, a remedial network for shareholders should not emphasize the winding up of companies. It should endeavour to provide mechanisms to "rectify" wrongs within the corporate structure rather than closing it down altogether.

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[14] See Akanki, *supra* note 6 at 286-287. It is quite surprising that in spite of the problems of the minority shareholder in Nigeria which has already been examined in Chapter two, the Nigerian law reform did not deviate from this approach. By way of contrast, in nearby Ghana, a deviation from the British oppression remedy was made in 1962 by the enactment of a liberal unfair prejudice remedy. The Ghana reform was the product of Professor Gower as a retained Law Reform Commissioner to Ghana. See Akanki at 287. See also L.C.B. Gower, *Final Report of the Commission of Enquiry into the Working and Administration of the Present Company Law of Ghana* (London, 1961).

[15] See Chapter Two.

III. The New Oppression and Unfair Prejudice Remedy in Nigeria

The Nigerian Law Reform Commission in 1990 succinctly acknowledged the structural defects of the oppression remedy outlined above, especially the limitation on the persons who can sue as well as the strict interpretation of the word "oppression."[16] It recommended a new oppression and unfair prejudice remedy.[17] To achieve these ends, it proposed the adoption of the Canadian unfair prejudice remedy contained in s. 241 of the CBCA, but in addition would recite 'discrimination against a member of a company' as a further ground for the oppression remedy. The addition of 'discrimination' as a ground establishing oppression is entirely superfluous and has its origin in the Australia corporations law.[18]

Section 311 of the Nigerian the *Companies and Allied Matters Act*[19] (hereinafter "CAMA") follows these recommendations and provides:

> 311(2) An application to the court by petition for an order under this section in relation to a company may be made -
>
> (a) by a member of the company who alleges -
>
> (*i*) that the affairs of the company are being conducted in a manner that is oppressive or unfairly prejudicial to, or unfairly discriminatory against, a member or members,

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[16] See Nigerian Law Reform Commission "*Working Papers on The Reform of Nigerian Company Law Vol. 1 - Review and Recommendations* (Lagos: Nigerian Law Reform Commission, 1989), (hereinafter "Working Papers") at 243.

[17] The Nigerian Law Reform Commission was influenced highly by reforms in other commonwealth countries such as Canada, Australia and New Zealand. See Working Papers, *ibid.* at 242, para. 38.

[18] See Australia *Corporations Law* No 89 of 1981 s. 320s.. The wordings of this section and the Nigerian provision are virtually identical. The minor differences in the Nigerian provision do not make any difference to the scope and structure of the two provisions. For a brief analysis of the Australian oppression remedy, see G. P. Stapledon, "Use of the Oppression Provision in Listed Companies in Australia and the United Kingdom" (1993) 67 Australia L.J.575 at 575 - 576.

[19] Cap. 59, Laws of the Federation of Nigeria, 1990.

> or in a manner that is in disregard of the interests of a member of [sic] the members as a whole; or
>
> (*ii*) That an act or omission or a proposed act or omission, by or on behalf of the company or a resolution, or a proposed resolution, of a class of members, was or would be oppressive or unfairly prejudicial to, or unfairly discriminatory against, a member or members or was or would be in a manner which is in disregard of the interests of a member or the members as a whole.[20]

Few judicial pronouncements have been made on the full impact of these provisions. It is therefore necessary to examine the operations of the Canadian oppressions remedy -- from which part of the Nigerian law is borrowed -- for a proper analysis of the Nigerian provision.[21]

IV. The Oppression And Unfair Prejudice Remedy in Canada

Canadian corporate law was able to avoid the traditional problems associated with the oppression remedy in England and in Nigeria.[22] This is because the Dickerson Committee[23] recommended inclusion of the British oppression remedy as refined by the very sound recommendations of the 1962 Jenkins Committee.[24] Section 241 of the *Canada Business Corporations Act*[25](hereinafter "CBCA") provides:

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[20] Members under the CAMA include personal representatives of a decreased member and any person to whom shares have been transfered or transmitted by operation of law. See CAMA s. 310(2). Directors and officers or former directors or officers of the company, creditors and the Corporate Affairs Commisison are also entitled to sue. See CAMA ss. 310(1) and 311(2)(b) and (c).

[21] It is better to draw from the Canadian experience for analysis of the Nigerian provision rather than Britain or Australia. This is because, unlike Britain and Australia, Canada and Nigeria have comprehensive provisions for the derivative suit. The implication of this is more fully examined below.

[22] Note however that British Columbia had the British type oppression remedy. See *Companies Act* RSBC 1960, s. 195. However, due to the hardship created for minority shareholders (due basically to the defects such as those that made it ineffective in Nigeria under the 1968 Act), it amended the section in 1973 in line with the recommendations of the Jenkins Committee. See *Companies Act* RSBC 1973 c. 59, s. 224.

[23] The Dickerson Committee was the committee set up for the review of Canadian business corporations law. The committee was named after its chairman -- R.W.V. Dickerson. The recommendations of the committee was published in R.W.V. Dickerson, J.L.Howard and L.Getz, *Proposals for a New Business Corporations Law for Canada* Vol.1 (Ottawa: Information Canada, 1971) (hereinafter the "Dickerson Report")

> 241.A complainant may apply to court for an order under this section.
> (2) If, on an application under subsection (1), the court is satisfied that in respect of a corporation or any of its affilliates
> (a) any act or omission of the corporation or any of its affiliates effects a result,
> (b) the business or affairs of the corporation or any of its affiliates are or have been carried on or conducted in a manner, or
> (c) the powers of the directors of the corporation or any of its affiliates are or have been exercised in a manner
> that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer, the court may make an order to rectify the matters complained of.[26]

The court is given wide discretionary powers to make appropriate orders, including but not limited to 14 orders stated in the section.[27]

Section 241 of the CBCA makes substantial improvements on the British s. 210.[28] Significantly, since the new remedy is not linked to the winding up remedy, it is not necessary to prove that the conduct was sufficiently egregious as to justify winding-up. Second, the remedy does not require a continuing course of action thereby capturing more kinds of oppressive conduct than the oppression remedy under the English 1948 Act or the Nigerian

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[24] This initiative was first started in Ontario. The Select Committee on Company Law in Ontario, 1967 in recommending the inclusion of a modified oppresssion remedy in the Ontario company law stated that "[t]he underlying philosophy of s.210 [of the *British Company Act*, 1948] has an air of reservation and defeatism about it as if the legislature was unable to offer any solution to the plight of minority shareholders...." See *Interim Report of the Select Committee on Company Law*, (Ontario Legislative Assembly, 1967) at para. 7.3.12. See also B. Welling, *Corporate Law in Canada, the Governing Principles*, 2nd ed. (Toronto: Butterworths, 1991) at 563, footnote 337.

[25] R.S.C. 1985, c. C-44

[26] Security means shares of any class or a debt obligation of a corporation. See CBCA s. 2.

[27] See CBCA s. 241(3).

[28] See the Dickerson Report, *supra* note 23 at 162.

1968 Act.[29] Most importantly, the term oppression has been widened to include unfair prejudice or unfair disregard of the interests of any shareholder. These words appear to be intended to signal a lower standard for objectionable conduct. As well, the powers of the court in determining a remedy have also been greatly expanded. That is, s. 241(3) provides for a number of distinct remedies but also accords to the courts the power to make any order it sees fit.

The operation of the Canadian oppression remedy has been more liberal and successful than under the 1948 English Act.[30] This success stems from the CBCA's wide statutory provisions and the generous interpretation given by Canadian judges. Clearly, the CBCA permits present and former shareholders, and beneficial holders of shares to sue under the oppression remedy.[31] Second, oppressive conduct by affiliates of companies can also be remedied under the provision.[32] The only controversial aspect of the Canadian approach is the fact that s. 241 does not expressly identify threats or anticipated acts as being potentially oppressive. In *Bank of Montreal* v. *Dome Petroleum*, [33] for example, it was held that anticipated acts or threatened acts are not covered by the provisions of the CBCA oppression remedy. However, in *820099 Ontario* v. *Harold E. Ballard,*[34] in line with the more liberal approach by judges, the court pointed out that "apprehension of future oppression might be dealt with if it was clear on a balance of probabilities that such oppression would take place."[35]

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[29] See *Sparling* v. *Javelin Int. Ltd.* (No .1), [1986] R.J.Q. 1073 (S.C.).

[30] It is recorded that only two cases were successfully prosecuted under s. 210 of the 1948 oppression remedy in England: *Scottish Co-Operative Wholesale Society Ltd.* v. *Meyer, supra* note 11, and *Re H.R. Harmer Ltd*, (1957), [1959]1 WLR 62 (C.A.). See Consultation Paper No 162, *supra* note 7, at 57, footnote 27.

[31] See CBCA s. 238 which defines "complainants" who can sue under the section. It is even possible for a person to purchase shares for the purpose of qualifying as a complainant. See *Palmer* v.*Carling O'Keefe*, Breweries (1987), 37 B.L.R. 316 at 323-324 (Ont. S.C.).

[32] See CBCA s. 241 and *Tsui* v. *Int. Cap. Corp.*, [1993] 4 W.W.R. 613 at 629-631, and *Gillis* v. *Johnson Corp.* (1996), 138 NF.&PEIR 135 at 137-141.

[33] (1987), 54 Alta .L.R. (2d) 289 at 299 - 301 (Q.B). (The applicant for the oppression remedy here was a creditor).

In short, the words of Justice Farley in the *820099 Ontario* case above describes how far the judges are willing to expand the oppression remedy in favour of the minority shareholder. As put by J. T. Chapman, the tendency is to use the oppression remedy "as an all encompassing provision from which all analysis could commence and beyond which it was not necessary to go."[36] In line with this liberal approach, the terms "oppressive", "unfair prejudicial" and "unfair disregard" are construed from a wide remedial perspective. While "oppression" means "harsh, burdensome and wrong",[37] the courts have however, held that the new provision for "unfair prejudice" or "unfair disregard" creates a lower standard.[38] In its interpretation, the courts are unwilling to put the terms into water tight compartments that require different and specific facts to prove.[39] Instead, the courts are of the view that the words impose obligations of fairness on the parties which is dictated by the expectations of the parties.[40]

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[34] (1992), 3 B.L.R. (2d) 113 (Ont. Gen. Div.).

[35] *Ibid.* at 201, per Farley J.

[36] See J.T. Chapman, "Corporate Oppression: Structuring Judicial Discretions" (1996) 18 The Advocate Quarterly 170 at 183 (footnote ommitted).

[37] See *Redekop* v. *Robco Construction Ltd.* (1978), 5 B.L.R. 58 at 68 (B.C.S.C.). In this case, Justice Meredith adopted the dictionary definition of oppression offered by Viscount Simonds in. *Meyer supra,* note 11. This was decided under the British Columbia equivalent provision of the s. 210 of the British 1948 Act.

[38] See *Mason* v. *Intercity* (1987), 59 O.R. (2d.) 631 at 635 (C.A.) and *Westfair Foods Ltd.* v. *Watt* (1991), 5 B.L.R. (2d) 160 at 166 (Alta. C.A.).

[39] See *Westfair, ibid.* at 166 where Kerans J. said "I cannot put elastic adjectives like "unfair", "oppressive" or "prejudicial" into watertight compartments. . .this repetition of overlapping ideas is only an expression of anxiety by Parliament that one or the other might be given a restrictive meaning"

This umbrella approach of fairness is also accepted by the Canadian law reformers. For instance, the Alberta Institute of Law Reform and Research (now called the Alberta Law Reform Commission) concluded that the three criteria recited in s. 241 probably "come down to one criterion which, so far as a shareholder is concerned is this: is the conduct unfair to the shareholder?"[41]

The typical approach of the judges in construing this duty of fairness is to consider the reasonable expectations of the parties.[42] This approach recognizes the reality of the corporation as something more than the abstract entity. As Lord Wilberforce in *Ebrahimi* v. *Wesbourne Galleriss Ltd.* [43] observes: "the limited company is more than a mere judicial entity ...behind it, or amongst it, there are individuals, with rights, expectations and obligations *per se* which are not necessarily submerged in the company structure".[44]

Also in line with this liberal aproach, the Canadian courts have also held that "bad faith or want of probity" is not required to succeed in an actions under the oppression and unfair prejudice remedy.[45] Although there are decisions to the contrary, the prevalent view is that bad faith is not required.[46]

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[40] *Ibid.* at 167 - 169. See also 820099 *Ontario Inc. v. Harold Ball Ltd., supra* note 34 at 185-186. See also *Naneff* v. *Con-crete Holdings Ltd.* (1995), 23 O.R. (3d) 481 at 487-492 (C.A.).

[41] See Institute of Law research and Reform, *Proposals for a New Alberta Business Corporations Act* (Report No 36) (Edmonton: ILRR, 1980) at 142.

[42] See note 38ff.

[43] [1972] 2 All E.R. 492 (H.L.).

[44] *Ibid,* at 499. Some scholars also support this shareholder expectation approach. B. Welling stated that "[t]hwarted shareholder expecatation is what the oppression remedy is all about". See B. Welling, *supra* note 24 at 533.

By far the most controversial issue in this area of Canadian jurisprudence is the relationship between the oppression remedy and the derivative action. Writers point to several decisions that uphold the oppression remedy in a wide number of issues that also constitute injury to the corporation, and for which, ordinarily, only the corporation could sue. Examples include oppressive actions proceeding on the basis of excessive remuneration by directors, unauthorized corporate loans, and interested director transactions.[47] In *Ontario Securities Comm.* v. *McLaughlin*,[48] for example, Justice Henry stated that the statutory wording of the oppression remedy "is quite capable of embracing conduct that is prejudicial to the corporation and so may overlap sections 245 derivative actions."[49] Similarly, in *Sparling* v. *Javelin Int.Ltd.*[50] the court explained that "[t]o decide that any right belonging to the corporation may only be exercised by way of derivative action would be to deny the fundamental nature of the reform which the enactment of section 234 represents."[51]

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[45] See *Brant Investments Ltd.* v. *KeepRite Inc.* (1991), 80 D.L.R. (4th) 161. (Ont. C.A.). Here, Justice McKinlany stated that "a requirement of lack of *bona fides* would unnecessarily complicate the application of the provision and add a judicial gloss that is inappropriate given the clarity of the words used," at 176. She accepts however that depending on the facts, evidence of bad faith at times could be relevant.

[46] See J.G. MacIntosh, "Bad Faith and the Oppression Remedy: Uneasy Marriage, or Amicable Divorce? (1990), 69 Can. Bar. Rev. 276. MacIntosh cites several decisions to the contrary at 281-285, but he supports the "no bad faith requirement" decisions at 297.

[47] See V.A.E. Dyer, "Derivative and Oppression Actions: Are They Mutually Exclusive?" (1993) 1 Roland on Corporate Litigations" (No.2) 14.

[48] (1988), 11 O.S.C.B. 443 (Ont. H.C.).

[49] *Ibid.* at 450.

[50] *Supra* note 29..

The opposite view was taken in *Pappas* v. *Acam Windows Inc.*[52] Here, minority shareholders of Pappas Ltd. alleged oppression due to cost overruns by majority shareholders in purchase of land and other equipment as well as breach of the shareholders' agreement. It was also argued that the company's money has been misappropriated to the detriment of minority shareholders. However, the Newfoundland Supreme Court held that the suit from the facts as stated was derivative in nature and could not proceed under an oppression rubric.

This decision has been seriously criticized as being contrary to the spirit of the statutory provision of the oppression remedy. It is contended that the remedies specified in s. 241 of the CBCA embrace the remedies available under the derivative action. Therefore, the restrictions stated in the *Pappas* case are unjustified. It is also argued that the judicial supervision of the oppressions remedy and the fact that it is not subject to shareholders approval are all against the decision in *Pappas.*[53]

Much as the decision in *Mclaughlin*[54] and *Sparling*[55] may be laudable, *Pappas* was correct in its pronouncement that "[t]o permit a personal action under the oppression remedy sections of the *Corporations Act* in all such cases would be to eviscerate the derivative action sections of the Act."[56] Indeed, as further stated by Mr. Justice Barry in the *Pappas* case, the provisions require the courts "to exercise a discretion, based upon the circumstances of the particular case, in deciding whether those overlap cases . . . should be allowed to proceed without leave . . . ."[57]

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[51] *Ibid.* at 1125.

[52] (1991), 2 B.L.R. (2d) 180 (Nfld. S.C. T.D.).

[53] See V.A.Dyer *supra,* note 47 at 17.

[54] *Supra*, note 48.

[55] *Supra*, note 50.

Justice Barry's view in *Pappas* is also subscribed to by academic writers such as Professor Ziegel. Ziegel is of the view that the difference in the organizational structure between the private and public companies calls for a cautious application of the oppression remedy. He supports the view that there should be a difference in judicial approach when applying the oppression remedy to the private corporation than to the public corporation. According to Ziegel, "[v]ery often in a private corporation, a wrong that is formally a wrong to "the company" is in fact simply symptomatic of a dispute between various parties in the corporation."[58] Therefore it may be a basis for allowing the oppression remedy in derivative type of actions. He argues however, that in situations where not all shareholders are parties to the dispute, to allow an oppression remedy in such situations would result in forcing other parties to become parties to the litigation. Furthermore, even in situations where the conduct affects all shareholders, there will be no easy or fair way for some of the shareholders to institute the oppression remedy without the others.[59]

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[56] *Supra* note 52, per Barry J. at 214.

[57] *Ibid.* at 215.

[58] See J.S. Ziegel, R.J. Daniels and L. Johnston eds. *Cases and Materials on Partnerships and Canadian Business Corporations* Vol. 2 (Toronto: Carswell, 1994) at 1227.

[59] *Ibid.* at 1277-1228. See also J.G. MacIntosh, "The Oppression Remedy: Personal or Derivative?" (1991) 70 Can. Bar Rev. 29 at 59-70.

V. Comparison: Canadian and Nigerian Oppression Remedy

From the Canadian and Nigerian statutory provisions on oppression and unfair prejudice, one matter is very clear: both legislative reforms attempt to escape the problems of the British 1948 initiative. There is also a desire to give minority shareholders greater protection from the majority shareholders. Therefore, the Nigerian and Canadian oppression remedies are similar in their basic concepts, though there are still areas of difference.

The parties who can sue under the oppression remedy in Nigeria and Canada are parallel. Although the Canadian legislation specifically includes affiliates of companies, which is not in the Nigerian provision, the wide discretionary powers of the court to allow other "proper persons"[60] could cover this category of applicants. By including any "proper person" it is clear, as stated by the Nigerian Law Reform Commission, that the intention of the Act is that 'the class of persons [who can sue] should be widened to include such persons who may have suffered or are likely to suffer from conduct which is prejudicial to their interest."[61] This interpretation is not only reasonable but purposeful because of the fact that oppression of minority shareholders may be perpetrated by the majority shareholders of parent companies or affiliates, as the case may be.

In the area of the conduct being regulated, there are some differences between the two jurisdictions. As noted earlier, while the Nigerian provision clearly includes proposed acts or omissions, the Canadian legislation does not.[62] On the other hand, the Nigerian provision includes conduct which is "unfairly discriminatory against a member or members", a scenerio which is not present in the Canadian legislation.[63] However, ultimately, the result would probably be the same. The conduct redressable under the two pieces appears to capture that which is "a visible departure from the standards of fair dealing, and a violation of the conditions of fair play on which every shareholder who entrust his money to a company is entitled to rely."[64]

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[60] See CAMA s. 310(1)(e). In appropriate cases too, the activities or relationship between the parent company and its subsidiaries could be interpreted as part of the "affairs of the company" which will entitle the shareholders of the subsidiary company to sue as in *Meyer, supra* note 11.

[61] See Working Papers, *supra* note 16 at 243.

Remedies available under the Nigerian and Canadian provisions are virtually the same. The courts have wide and unlimited discretionary powers to order a broad range of remedies. There are two major differences between the two jurisdictions concerning the regulation of the oppression remedy, however. Under the CBCA, majority approval of the conduct complained of is not a bar to the action,[65] and court approval is required for settlement of the oppression action.[66] There are no equivalent provisions for the oppression action under the CAMA. As expressed by the Dickerson Committee, the provision concerning majority approval "abrogates that aspect of the rule in *Foss* v. *Harbottle* that bars a shareholder from complaining of alleged misconduct on the ground that the impugned act *might* be authorised or ratified at a meeting of shareholders...."[67] The purpose of the rule requiring court approval for settlement is to prevent vexatious and unmeritorious litigation.

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[62] See CBCA s. 241 and CAMA s. 311(2)(a).

[63] The words "discriminatory against a member or members" is derived from the the Australian corporations law. See note 18.

[64] See *Elder* v. *Elder and Watson Ltd. supra*, note 10 at 55.

[65] See CBCA s. 242(1).

[66] See CBCA s. 242(2). See also, *Journet* v. *Superchef Food Industries Ltd.* (unreported, Que.S.C., 1984) reported in Ziegel, *supra* note 58 at 1210.

In Nigeria, the fact that certain oppressive conduct may also constitute wrongs to the corporations would create serious confusion as to whether such wrongs could be redressed by an oppression remedy or only through a purely derivative suit. Further confusion on this point is created by s. 299 of the CAMA which states, in part, that only the company can sue for wrongs done to the company. Although for derivative suits, majority approval is recited in the Act as not being a bar to an action,[68] a similar rule is not recited with respect to the oppression actions.

In short, confusion as to the relationship between the oppression remedy and the derivative suits exists under both the Canadian and Nigerian legislation. However, the problem is lesser under the Canadian law. The approach by Canadian courts has been to allow to proceed many cases that would ordinarily have been brought under the derivative suit.[69] The decisions in the *Pappas* case however shows the two suits are not necessarily coextensive.

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[67] See The Dickerson Report, *supra* note 23 at 164, para. 487.

[68] See CAMA s. 305 and 306. For these provisions, see Appendix A.

[69] This approach has been called into question by the decision in *Hercules ManagementLtd.* v. *Ernest Young* (1997), 146 DLR (4d) 577 (S.C.C.). In England, there is also the tendency for shareholders to apply under the oppression remedy to redress wrongs which ordinarily constitute a wrong to the corporation. See Consultation Paper No 142, *supra* note 7 at 82 -88 and Appendix E, Table 1 therein. The consultation paper states for instance, that out of 156 petitions filed under the oppression remedy in 1984/85, 64 are for misappropriation of corporate assets, 18 for excessive remuneration, 31 for other breach of fiduciary duties. The same attitude is recorded in Australia. See *Re Overton Holdings Ltd*[1985] W.A.R. 224, where the oppression remedy was allowed for directors' interested transactions. See also G.P. Stapledon *supra*, note 18 at 578 -579 and 588-595. It should however be noted that unlike Nigeria and Canada, Britain and Australia do not have the modern derivative suit action. The rule in *Foss* v. *Harbottle* (1843), 2 Hare 461 (Eng. H.L.) in its crude form still applies. Therefore the tendency to allow all sort of derivative action type of suits is understandable.

On the Nigerian side, the presence of the *Foss* v. *Harbottle* rule and the absence of the equivalent of the Canadian s. 242 (1) and (2) makes the situation rather complicated. The Nigerian courts have not had the opportunity to examine the relationship between these two remedies, but some academic scholars are of the view that the two sections can overlap. According to Professor Akanki, the oppression remedy is a "derivative action writ large"[70], which has outflanked the rule in *Foss.*v. *Harbottle* in favour of minority shareholders. He opines that there is a basis to the view that some derivative action type suits -- such as breach of director's duties, misuse or waste of corporate resources -- is to invite court intervention on grounds that there has been a disregard of the interests of shareholders. He also argues that the remedies available, such as an order directing the company to institute actions against wrongdoers, are derivative in the proper sense.[71] Although Professor Akanki also agues that the overlap may lead to vexations litigation, he nonetheless supports the approach because, as he says, "it is a major step worth taking in a society that has no traditions of disciplined management outside the law."[72]

The optimism expressed by Professor Akanki may not be totally justified since the overall outcome would obviously depend on the approach of the judges. To interpret the oppression remedy subject to the majority rule provided in s. 299 would totally defeat the purpose of the legislation. Yet, to allow all wrongs to the corporation through the oppression remedy would sometimes lead to unwarranted litigation. This is because applicants would be avoiding the acid test of securing the leave of court to institute a derivative suit.

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[70] See E.O. Akanki, *supra* note 6 at 303.

[71] *Ibid.*

[72] *Ibid.* at 294.

On a strict interpretation of the legislation, it would appear that the Nigerian oppression remedy is subject to the proper plaintiff rule of *Foss* v. *Harbottle*. It would also appear to be subject to the majority principle, because of the fact that the legislation does not expressly provide that ratification by shareholders is not a bar to the oppression remedy suit. However, on a purposive construction of the provisions, with the background of the remedy in mind, the stronger view is that the oppression remedy is not based on procedural technicalities but on fairness. Fairness in turn, is not determined simply by asking whether, on the facts, what has been done by the majority is permissible but whether the impugned action falls short of the legitimate expectations of the parties. If the Nigerian judges interpret the oppression remedy in accordance with its purpose, shareholders' approval of the impugned action would not bar an oppression suit. This conclusion is particularly valid for private companies where breaches of directors duties and wrongs caused to the corporations also generally constitute an unfair prejudice to and disregard of the interests of minority shareholders.[73]

Another issue that the introduction of the new oppression remedy raises under both the Nigerian and Canadian corporate law is the extent to which the remedy has altered the relationship between majority and minority shareholders. On the one hand, there are still some routine structural factors built into corporations law that puts the minority shareholder in a disadvantaged position. Such factors include restrictions on the transfer of shares making it difficult for the oppressed shareholder to sell,[74] and voting according to the number of shares held, meaning that the oppressed shareholder's minority perspective could never carry the day. Effectively, this encourages greater control and participation -- directly or indirectly -- by the majority shareholder of the corporation.[75]

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[73] See for instance the examples given by the Jenkins Committee. See Consultation Paper No 142, *supra* note 7 at 59-60.

In short, the introduction of the new oppression remedy, in both Nigerian and Canada, has signalled a new approach to the problems of the minority shareholder. Central to the whole principle of the new oppression and unfair prejudice remedy is the relationship between the majority *vis a vis* minority shareholders. In fact, the new oppression remedy is thought by many scholars to have initiated a new fiduciary accountability for majority shareholders. As stated by the Dickerson Committee with reference to the wide powers given to the courts to control the oppression action:

> [i]mplicit in this policy is the premise that dominant shareholders, who are in a position to control management, owe a fiduciary duty to minority shareholders comparable to the duty that directors and officers owe to the corporation. This policy constitutes a major divergence from the English common law . . . [76]

This approach to the new oppression remedy has been validated by academic scholars including Professor J. MacIntosh, J. Holmes and S. Thompson, in their article, "The Puzzle of Shareholder Fiduciary Duties."[77] They argue that the oppression remedy does create a fiduciary duty in the majority shareholders in favour of the minority shareholders. Put another way, they contend that the standard of fairness demanded by the oppression remedy and demanded from those who have a fiduciary duty are highly parallel, although they agree that the statutory oppression remedy is wider than the common law fiduciary duties.[78] They also make reference to the American approach which classifies majority shareholders as fiduciaries of minority shareholders.[79]

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[74] Under the CBCA, the applicable provision is permissive. See CBCA, s. 6(d) whereas the Nigerian equivalent is mandatory, every private company must by its articles restrict the transfer of its shares. See, CAMA, s.22(2).

[75] For a review of these special legislative provision for the private or closely held corporation in Canada, see Ziegel, *supra* note 58 at 1082-1126.

[76] See the Dickerson Report, *supra* note 23 at 165 para. 487 (emphasis mine.).

[77] (1991) 19 Can. Bus. L.J. 86.

The view that majority shareholders owe fiduciary duties to minority shareholders has ultimately been rejected in Canadian corporate law, however, following the decision of the Ontario Court of Appeal in *Brant Investments Ltd.* v. *Keep Rite*.[80] Here, minority shareholders of KeepRite Ltd. challenged the acquisition of assets of the company's two affiliate companies, arguing that the majority shareholders -- being the ultimate beneficiaries -- were in breach of their fiduciary duties to the minority. The court, however, rejected this argument and held that, in the absence of facts to prove unfairness, the transaction was not oppressive and that no fiduciary duty was owed by the majority to the minority.[81]

In sum, the wide approach adopted by the statutory oppression remedy may give the impression that majority shareholders now owe fiduciary duties to minority shareholder but this is erroneous. At common law, the fiduciary principle is not an automatic palliative since, when applied to corporations law, it is not necessarily driven by fairness but by considerable strict technicalities that may have no relationship to the result. In *Regal (Hastings), Ltd.* v.

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[78] *Ibid.* at 130 - 134.

[79] *Ibid.* at 89 - 92.

[80] *Supra* note 45.

[81] *Ibid.* at 172. This decision has been followed in other decisions in this regard that majority shareholders owe no fiduciary duties to minority shareholders.

Gulliver[82] for example, the question was whether the purchase of shares by Regal directors occured as a result of their position as directors, pure and simple, and not whether the acquisition of shares produced an unfair result for the company or other shareholders.[83]

Conversely, the oppression remedy as framed in the statute, gives the courts a wide discretion to examine the facts on the merits and not on mere technical grounds. As the court in *KeepRite* rightly observed, "s.234 [of the *Ontario Act*] is so broadly formulated, the evidence necessary to establish a breach of fiduciary duty would be subsumed in the broader range of evidence which would be appropriately adduced on an application under the section."[84]

The fiduciary approach followed in the United States is of limited utility in seeking to understand the Canadian and Nigerian oppression provisions. This is because although majority shareholders owe a fiduciary duty to minority shareholders in the U.S,[85] this approach developed in the absence of the oppression remedy. [86] Because, however, U.S. courts over the years have articulated specific types of duties by such majority shareholders in specific circumstances which parallel the categories found in Canadian jurisprudence (such as the relationship between parent/subsidiary companies),[87] scholars like Greta Fung argue that the fiduciary principle could work concurrently with the oppression remedy.[88] This is a questionable conclusion, however, and runs the risk of complicating the oppression remedy with technical rules. A corporate jurisprudence over-burdened with rules may end up eroding the wide discretionary powers given to courts to examine the facts of each case to identify and remedy oppressive conduct.

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[82] [1942] 1 All E.R. 378 (Eng. H.L.).

[83] As stated by Lord Russell of Killowen in the *Regal* case, *ibid.* at 389c; "... the directors standing in a fiduciary relationship to Regal ... having obtained these shares **by reason and only by reason** of the fact that they were directors of Regal and in the course of the executions of that office, are accountable for the profits which they have made out of them". (emphasis mine). (The question was not whether the acquisition was fair on the company or the minority shareholders).

[84] *Supra* note 45 at 172.

[85] See *Pepper* v. *Litton* 308 U.S. 295 at 306 and 311 (1939). See also Ziegel *supra*, note 57 at 767- 805 for a survey of the American approach to fiduciary duties by majority shareholders.

[86] Some States such as Delaware do not have the oppression remedy. See K. G. Ottenbreit and J. Walker, "Learning From the Delaware Experience: A Comparison of the Canadian Business Corporations Act and the Delaware General Corporation Law" (1998) 29 Can. Bus L. Rev. 364 at 374 -375.

It is significant that the advantages and benefits of the oppression remedy have received strong support from law and economics scholars. In Brian Cheffins' economic analysis of the oppression remedy, for example, he argues that the remedy accords well with the contract paradigm:[89] by virtue of the oppression remedy, parties to the corporate contract inherit the term prohibiting oppressive conduct, which term they otherwise would have had to have bargained for.[90] He, however, cautions that there can be resulting costs from the oppression remedy such as solicitor's costs, disruption of intra corporate relationship and opportunistic tendencies by minority shareholders. On balance, though, Cheffins believes that such costs could be lessened if the courts "focus on the content of the agreement between the participants, both in relation to express clauses and what the agreement would have been if the negotiations had been costless".[91]

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[87] See G.M. Fung, *supra* note 2 at 58 -71.

[88] *Ibid.* at 88 - 92.

[89] See B.R. Cheffins, "An Economic Analysis of the Oppression Remedy: Working Towards a More Coherent Picture of Corporate Law" (1990) 40 U.T.L.J. 775 at 789.

[90] *Ibid.* at 789-790.

VI. Oppression Remedy: Theory and Practice in the Socio-Economic Context

As posited in the previous chapters, when economic development is identified as an organising goal, the examination of a given corporate concept is most fruitful when contextualized by the socio-economic and cultural influences on the corporation and its organizational behaviour. Theoretically, the oppression remedy in the Nigerian and Canadian context, compared to the British approach, is more suited to fostering economic and social development. By giving status to parties other than shareholders to sue for oppression, it recognises the corporation as a concept other than a mere fiction, but as an entity that encompasses other interests and considerations. As advocated in Chapter One of this thesis, it is a recognition of the corporation as an amalgam of multiple interests and considerations that, in balance, can advance the social and economic aspirations of a country.

Furthermore, the actual operation or application of the oppression remedy should be understood in this socio economic context. The underlying basis of the remedy -- promoting fairness and the reasonable expectations of shareholders -- are simple and attractive. However, if this standard of reseasonable expectations is not considered in its social and economic context, the oppression remedy as formulated, is capable of producing undesirable results. First, in Nigeria, due to the shareholders' level of social, educational and economic development, most do not pay special attention to the provisions of the articles.[92] In such situations, emphasis on shareholder expectations as manifest in the memorandum and articles of association would be misplaced. Therefore, the operation of the oppression remedy in such an environment would require a special attention to the informal manner by which most of these closely-held corporation are operated. The reasonable expectation approach is better suited for such "behind the-corporation" analysis than the majority-fiduciary duty approach explored earlier.

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[91] *Ibid.* at 792 (footnote omitted.) Cheffins also supports the fact that the oppression remedy should apply to both private and public companies because the possibility of self-serving interests still exists in public companies despite other market protective devices.

Second, the particular and pressing need for economic development in Nigeria also requires a judicial approach which encourages growth and investment in the corporation. In this regard, both the "fiduciary approach" and the "reasonable expectations" approaches may prove to be problematic. On the one hand, because the fiduciary approach is not necessarily based on the fairness of the transaction but more on whether the transaction favours majority shareholders at the expense of minority shareholders, it cannot effectively isolate sincere cases where the growth and well being of the corporation favours such transactions from the illicit transaction whereby the transaction simply benefits the majority at the expense of the minority.

On the other hand, even the reasonable expectation approach may also become a hindrance to corporate growth. As pointed out earlier, the need for development requires a conception of the corporation as something more than the shareholders, but encompassing, and having a wider impact on other constituencies such as the employees, creditors, and the general economy of the country.[93] As is sometimes the case, growth and expansion of enterprises may require divestment of promoters interests, dislodgement of promoters as managers to make way for professional managers or the need for additional capital which the initial promoters may be able to afford.

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[92] See Chapter Two.

A willingness to replace the family manager with a professional one has has been revealed in research by the United Nations Research Institute for Social Development. In its 1996 study of Nigeria's economic crisis and the adjustment strategies, it states that "[o]ne of the biggest challenges posed to manufacturers [in Nigeria] by the crisis and adjustment measures was the question of management and its acumen"[94] The study further reveals that one of the strategies adopted in closely-held corporations was a change in management. It states:

> [o]f 33 . . . [Companies] who said members of their immediate or extended families were involved in the running of their factories at a managerial/director level, 20 [of the companies] . . . said that as of 1982 they had dropped family members in the managerial/director cadre who either had no training in management, showed little or no interest in the business or had difficulty getting on with other staff members.[95]

In such an environment, the issue of shareholders' expectations -- if emphasized as an end itself, without regard to the welfare of the corporation separate and apart from the shareholders -- may become antithetical to growth and development. For example, exclusion of a less than gifted family member from management may be contrary to that individual's reasonable expectation when first embarking on the venture but, with subsequent corporate growth and expansion, that individual's continuing managerial presence may cause serious hardship on the corporation and even its demise.

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[93] See S. Rees, "Company Law's Role in Economic Development: The French Approach" (1994) 68 Australia L.J. 777 at 787. Rees argues that economic development requires a good market conception, company's longevity and internal stability. He points out however that "[o]ne aspect of the longevity goal is recognising that the company business is separate from the promoters and managers. More particularly, it is recognising that a company's failure may be caused not by inherent weakness of the business but perhaps by weakness in the initial promotion of the company, or by weakness in the ongoing promotion by shareholders, or by weakness in management."

[94] See A. Olukoshi, *Economic Crisis, Structural Adjustment and the Coping Strategies of Manufacturers in Kano, Nigeria, (Discussion Paper presented to the United Nations Research Institute for Social Development),* (Geneva: UNRISD, 1996) at 32.

[95] *Ibid.*

The same analysis also applies to raising of shares for additional capital requirements of the company. Such a demand may lead to a serious reduction in the interests of the share holdings of the original promoters or precipitate a buy out. However, what started as a small, private and closely-held company in this example may have to move towards a more advanced means of production, in order to compete. In such a situation, it is unreasonable that a shareholder's expectation that the corporation shall remain a small or closely held corporation would determine whether an act of the corporation is unfairly prejudicial or a disregard of the interest of some shareholders within the meaning of the oppression provision. Protecting such an expectation would have the undesirable effect of producing corporate stagnation.

It is submitted that the test of "reasonable expectation" may be a useful guide for the Nigerian courts but, in the interests of a contextualized analysis, it should not be understood as an end in itself. Instead, a consideration of an oppressive conduct should self consciously involve an all-round assessment, including the interest of the corporation as distinct from the incorporators. The question should not simply be whether the majority shareholder as ultimate beneficiaries will reap the gain of such transaction but whether the allegedly oppressive conduct nonetheless advances corporate growth. The disappointed expectations of the minority shareholder in such cases can be compensated for or otherwise compesated by means of a generous, court ordered buy-out. Axiomatically, holding back the company in the name of shareholder expectations cannot produce the needed economic development for Nigeria.

Indeed, the oppression remedy is better suited than the derivative form of action for a developing economy like Nigeria and even the developed country like Canada. This is because, as revealed from the analysis of the socio-economic and political context of the corporation in these two countries, the greater problem faced by the Nigerian shareholder, for instance, is the problem of minority oppression.[96] Even though the problems of breach of fiduciary duties are a common occurrence, because of the ownership structure of majority of these companies, (coupled with participation of the majority shareholder in management), such breaches are likely to be subsumed under the oppression remedy. The problems of widespread poverty, the high cost of litigation and substantial delays in court in Nigerian favour the oppression remedy because such an action does not require the preliminary application for leave (as in the derivative) which will in most cases contibute to the already existing chronic delays in litigation.

However, the absence of cost incentives to minority shareholders can be a disadvantage in the Nigerian provision. The minority shareholder, considering the delays in court, may be unwilling to pursue litigation as an option because of the associated expenses. This may be the case even where the oppressive conduct is clear and glaring. In such a situation, costs incentives like the Canadian position[97] are necessary to fully realise the effects of the remedy in such environment. Although such incentive could lead to abuse, such abuse could be controlled by giving the courts wide powers of control over the conduct of the litigation.

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[96] See Chapter Two.

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[97] See CBCA S.242 (3)and (4). Under the CAMA, equivalent provisions are made for the derivative action in s.307 and 308, but it is applicable to the oppression remedy.

CHAPTER 5

PERSONAL AND ADMINISTRATIVE REMEDIES OF SHAREHOLDERS

I. Introduction

The corporations law of both Canada and Nigeria provides personal and administrative remedies to shareholders outside of the derivative action and the oppression remedy. These include the shareholders' right to enforce provisions of the corporate statute, memorandum and articles of association of the company (hereinafter "memo and article")[1] or other shareholders' agreement. There is also recourse to the Director of Corporate Registry (for Canada) or the Corporate Affairs Commission in Nigeria to investigate the conduct of the affairs of a company.

This chapter assesses these latter remedies in order to test their general effectiveness, both at common law and pursuant to statute. In Part II, the chapter examines the shareholders' right to institute personal actions at common law. Parts III, IV and V will explore the differences in the personal remedies between Nigeria and Canada, while Part VII and VIII deal with the investigation remedy. The author concludes that the oppression remedy is generally more effective in Nigeria than is recourse to these specific personal remedies. That is, in a developing society like Nigeria, the administrative remedies -- albeit unintentionally -- can produce bureaucratic bottlenecks and other social political ills.

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[1] Note that under the CBCA, there is no provision for the memo and articles. This is because the CBCA has adopted the division of powers model. For an account of the features of the two models in relation to shareholders' remedies, see Part V below.

II. The Shareholders' Personal Action at Common Law

At English common law, shareholders could institute personal actions under three circumstances: to enforce the contractual rights under the memorandum and articles of association, to enforce specific statutory rights granted to the shareholders in the corporate statute or under the exceptions to the rule in *Foss* v. *Harbottle*.[2]

a. Rights under the memorandum and article of association

The right of a shareholder to institute a personal action to enforce provisions of the memorandum and articles of association is based on the conception of the memo and articles as a contract.[3] The contractual nature of the memo and articles gives the shareholder the right to sue in his individual capacity, either the company or the shareholders for breach or attempted breach of the provisions of the memo and articles. In *Wood* v. *Odessa*[4] for example, a shareholder was able to restrain the company from paying dividends in the form of debentures as proposed, because it was contrary to provisions of the articles that dividends were to be paid by cash.

The recognition of the shareholders' right to enforce the provisions of the memo and articles seems logical. It is in line with contract law that parties are bound by the terms of their agreement.[5] But at common law, the contractual nature of the memo and articles deviated from this pure contract form. The ideology of the legal personality of the corporation and other statutory impediments limited the right of a shareholder to institute a personal action to enforce every provision in the memo.

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[2] (1843) 2 Hare 461. See Chapter Three, Part I and II for analysis of the rule in *Foss* v. *Harbottle*.

[3] This is traceable in the history of the corporation. The historic joint stock company was a contractual union between people pooling resources together for a common venture. The terms of the contract were provided in the "deed of settlement." The *Joint Stock Companies Act* 1844 (U.K.), which first provided for incorporation by registration, made the Deed of Settlement the procedural requirement for incorporation. Since the 1844 Act, common law has maintained the sanctity of the memorandum and articles of association as a binding contract between the shareholders and the company. See P.L. Davies, ed., *Gower's Principles of Modern Company Law* 6 ed. (London: Sweet and Maxwell, 1997) at 36 - 48.

[4] (1889), 42 Ch.D. 636 (Ch.).

First, the memo and articles unlike ordinary contracts, were subject to the other provisions in the corporate statute. Second, they could be amended by a majority of the shareholders in accordance with the provisions of the Act.[6] In addition, the shareholder could only sue to enforce provisions of the memo and articles which give him rights in his capacity as a shareholder and not otherwise. Consequently, rights which did not automatically flow from his membership of the corporation, such as employment, could not be enforced even though provided in the memo and articles.[7]

By far the most confusing restriction to the shareholder's right to enforce provisions in the memo and articles is the rule in *Foss* v. *Harbottle*, which provides that only the corporation can sue to remedy a wrong done to the corporation.[8] This rule, in turn, created the problem of rationalisation and definition of rights because a judge would have to assess whether a breach of the provisions of the memo and articles constituted an injury to the shareholder's personal right or an injury to the corporation. The courts at common law held that where a breach of the provisions of the memo and articles constituted an injury to the corporation, only the corporation could sue to remedy the wrong.[9] No test can predict with precision which right is personal and which is corporate. As the British Law Reform Commission has recently observed;

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[5] See M.P.Furmston and D.W.P. Simpsom, eds., *Cheshire, Fifoot and Furmston's Law of Contract* (London: Butterworths, 1996) at 606 - 659, particularly on remedies for breach of contract.

[6] This is however subject to some exceptions. The right of the majority to alter the memorandum and article of association must be in the interest of the corporation as a whole. See *Allen* v. *Gold Reefs of West Africa ltd*, [1900] 1 Ch. 656 (C.A.), particularly the judgement of Lindley M.R. at 671; and *Greenhalgh* v. *Arderne Cinemas, Ltd.*, [1951] Ch. 286 at 291 (C.A.).

[7] See *Eley* v. *Positive Government Security Life Assurance Co* (1876), 1 Ex.D.88 where the shareholder/director on dismissal sued to enforce the arbitration provision in the memo. His application was dismissed on the ground that his appointment as a director was not a shareholder right. See also *Beattie* v. *Beattie*, [1938] Ch.708 at 718 - 719. Though Professor Wedderburn argued that the case of *Salmon* v. *Quinn and Axten, Ltd*. [1909] 1Ch. 311 is authority for the contrary view, this however did not solve the controversy. See "Shareholders' Rights and the Rules in *Foss* v. *Harbottle*" [1957] Camb. L.J. 93, and [1958] Camb. L. J. 194.

[8] See note 3 *supra*.

> there can never be a comprehensive definition of what constitutes a personal membership right under section 14 of the Companies Act of 1985, [the memorandum and articles of association contract], since regard has to be had to the terms of the particular article in question and to the circumstances of the alleged breach.[10]

Another major problem with the shareholders' right of personal action was the fact that at common law, the majority had power to ratify breaches of the memo and articles if it constituted an internal irregularity.[11] This created the problem of identifying which breach of the provisions constituted a mere irregularity on the one hand, and which breach constituted a personal injury on the other. Furthermore, under the personal action, a shareholder would only be entitled to an injunction or declaratory relief -- remedies which may not be useful or appropriate in any given set of circumstances.

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[9] See *MacDougal* v. *Gardiner* (1875), 1 Ch.D.13 at 21-22 (C.A.). To resolve the controversy which surrounds the private right/corporate distinction which arises from the memorandum and articles of association and statute conferred rights, academic scholars and judges formulated different propositions as guides. According to Pennington,

> [t]he dividing line between personal and corporate rights is very hard to draw, and perhaps the most that can be said is that the courts will incline to treat a provision in the memorandum and articles as conferring a personal right on a member only if he has a special interest in its observance distinct from the general interest which every member has in the company adhering to the terms of its constitution.

See, R.R. Pennington, *Pennington's Company Law* 7th ed. (London: Butterworths, 1995) at 867. In contrast, N.A. Bastin proposes a "proprietary text", that the courts will enforce a provision in the memorandum and article if it confers a proprietary interest on shareholders. He is of the opinion that the decision in *MacDougal* v.*Gardiner* was decided on this basis. See "Enforcement of a Member's Rights" [1977] J.B.L.17 at 21-22. This proposition is highly questionable.

[10] See Law Commission (British), *Shareholder Remedies, A Consultation Paper* (Consultation Paper No 142) (London, Stationery office, 1996) (hereinafter "Consultation Paper No 142") at 141- 142 para. 14.8 (footnote omitted).

[11] See for instance *MacDougal* v. *Gardiner, supra* note 9 at 23, where the court held that failure to call a poll as requested by a shareholder, for a resolution for adjournment of a meeting in accordance with the memo and article, was a mere internal irregularity.

b. Statutory rights and the exceptions to the rules in *Foss* v. *Harbottle*

At common law, a shareholder was entitled to sue to enforce provisions in the corporate statute that conferred certain rights on her. However, the problem of determining whether a given provision in the statute created a personal right or a corporate right and whether a breach of a statutory provision was a mere internal irregularity or not certainly blurred the scope of this remedy.[12] Nevertheless, in addition to these statutory rights, shareholders at common law could also sue under the exceptions to the rule in *Foss* v. *Harbottle*, as seen in Chapter Three.

III. The Shareholders' Personal Action under Canadian Corporations Law

Canadian corporations law inherited the memorandum and articles of association corporate model from the English system. While this operated under the federal law, some provinces such as Alberta also adopted the same model, while other provinces adopted the letter of patent model.[13] The federal corporations law and the provinces that operated the memo and articles model provided for the contractual effect of the memo and articles, such as, s. 29 of the Alberta *Companies Act* [14]

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[12] See Consultation Paper No 142, *supra* note 10 at 14-17.

[13] See B. Welling, *Corporate Law in Canada, The Governing Principles* 2nd ed. (Toronto: Butterworths, 1991) at 42 - 71.

Accordingly, the issue of distinguishing between personal rights and corporate rights from the provisions of the memo and articles was also a problem under the corporate law of these provinces as well as federally. Canadian scholars found this position inadequate. Professor Welling, for instance, criticized the restrictive interpretation of the memorandum and articles contract noting that, if the articles are a contract, then it should follow that any party to the contract can sue for breach of contract whenever the terms are violated.[15]

Corporate law reform in Canada in 1975 altered the position of the law in this regard by adoption of the division of powers model contained in the CBCA. It is still unclear however, if the problems associated with the shareholders' personal action under the memo and articles model has been totally eliminated. Under the division of powers model there is no section that provides for the contractual effect of the by-laws and articles of incorporation or the right of shareholders to enforce their provisions. The statute does, however, provide for the right of shareholders to institute personal action in two situations:

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[14] See R.S.C. 1970 c. 60, s. 29 which provides:

> The memorandum and articles when registered, bind the company and the members thereof to the same effect as if they respectively had been signed and sealed by each member, and contained covenants on the part of the member, his heirs, executors, and administrators and in the case of a corporation, its successors, to observe all the provisions of the memorandum and of the articles, subject to the provisions of the Act.

Similar provisions were also enacted in other jurisdictions that adopted the memorandum and article model. See section 13 of the *British Columbia Companies Act* RSBC 1979 c. 59. But see the opinion of the Alberta Institute of Law Research and Reform (now Alberta Law reform Commission) that the contract created by the section was artificial. See *Proposals for a New Alberta Business Corporations Act* (Edmonton: ILRR, 1980) at 21 para. 3

[15] See B. Welling, *supra* note 13 at 62- 63.

a. Compliance and restraining order

Section 247 of the *Canadian Business Corporations Act*[16] (hereinafter "CBCA") provides:

> If a corporation or any director, officer, employee, agent, auditor, trustee, receiver, receiver-manager or liquidator of a corporation does not comply with this Act, the regulations, articles, by-laws, or a unanimous shareholder agreement, a complainant or a creditor of the corporation may, in addition to any other right he has, apply to a court for an order directing any such person to comply with, or restraining any such person from acting in breach of, any provisions thereof, and on such application the court may so order and make further order it thinks fit.[17]

b. Specific Rights of Action

In addition to the above provisions, the statute also gives shareholders the right to apply to court to remedy specific breaches of the provisions of the Act. Under the CBCA, for example, s. 120(8) empowers a shareholder to apply to court to set aside any contract entered into by the company if a director or officer of the company is interested in the contract but fails to declare his interest as required by section 120(1). Similarly, s. 137(8) also entitles a shareholder to apply to court if the company unjustly refuses to include his proposal in a proxy circular.[18] Section 248 empowers the shareholders in such situations to apply to court by way of summary application,(by petition, originating notice of motion or as the rules of court provides.)

Several issues flow from these statutory rights of action. Does the division of powers model differ from the memorandum and articles of association model in terms of the shareholders' right to commence a personal action? Can a shareholder institute a personal action under the compliance order to enforce a wrong theoretically done to the corporation or only when it constitutes a personal wrong? What remedy can a shareholder get in a personal action? Does s. 248, read with the other specific provisions, create a separate personal remedy different from the compliance order? Must a shareholder get leave of court before he can sue under the compliance order in s. 247 and/or the summary procedure created in section s.248?

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[16] R.S.C. 1985 c.C-44.

[17] According to section 238 of the CBCA, the word complainant means a registered holder or beneficial owner or a former registered holder or beneficial owner of a security or any of its affiliates.

[18] See also CBCA ss. 246 and 145.

In *Re Goldhar and Quebec Manitou Mines Ltd*[19], a shareholder applied under the compliance and restraining order to nullify certain voting rights which the directors delegated to themselves. The court declined to give a broad interpretation to the provisions of s. 247. The court adopted a restrictive approach and held that the restraining and compliance order should be confined to rectification of a simple mechanical omission and matters that could be readily dealt with on a summary application and not complex issues involving corporate control.[20] Second, the court held that the restraining and compliance order applies only to the enforcement of personal rights and does not apply to the enforcement of corporate rights.[21] Put another way, the restraining order cannot circumvent the requirements of leave to bring a derivative action for a corporate wrong. Justice Reid therefore held that the duty of good faith and honesty, which the applicant was seeking to enforce, is a duty owed to the corporation and can only be corrected by a derivative suit.[22]

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[19] (1975), 61 D.L.R. (3d.) 612 (Ont.Div.Ct). Here, there were allegations that the directors wrongfully delegated the voting rights in the company's subsidiary and were using such voting rights for their personal interest, in breach of their fiduciary duty to the corporation. A shareholder applied under the compliance and restraining order to nullify the voting rights which the directors delegated to themselves and the votes cast thereby. The court dismissed the application.

[20] *Ibid.* at 615.

[21] *Ibid.* at 616-617.

Many scholars have written to condemn this restrictive approach.[23] The jurisdictional question of personal/corporate right dichotomy is considered *per incuriam* and undesirable because it has the detrimental effect of channelling judicial reasoning through the same unproductive private rights and corporate rights division of the *Foss* v. *Harbottle* era. It is also argued that the proper test is not whether the rights being enforced are direct or derivative, but rather, whether any provision of the Act has not been complied with or not.[24]

The personal/corporate rights distinction also arose in the British Columbia case of *Vogel* v. *International Nesmont Industrial Corporation.*[25] Here, three directors of the company were indicted by the company's auditors and independent accountants for financial improprieties. The applicant/shareholder successfully applied for an *ex parte* interim injunction restraining the directors from the making of group of loans to management including themselves, and from making certain payments to persons associated with them. They were also ordered to file an affidavit disclosing the location of some payments already made. On application to have the *ex parte* order set aside, it was argued that even if the allegations were correct, they were wrongs against the corporation and therefore, the shareholders could not sue except with leave of court. It is noticeable that in the suit, the applicants sued under s. 127 of the British Columbia Act which prohibits financial grant by any company where the company is or will be insolvent by such grant, and s. 146 which entitles any shareholder to go to court to restrain such transactions. The court held that s. 146 gives a shareholder direct authority to apply to court without leave. The court considered *Re Goldhar* and noted that it casts "serious doubts on the proposition that the court has an inherent jurisdiction to enjoin a threatened injury to a company where the requirements of the derivative action provisions . . . have not been complied with."[26] However it distinguished the *Goldhar* proposition as inapplicable because the application was brought under specific sections of the Act that gave such powers to shareholders. *Vogel* tends to support the proposition that shareholders can sue where specific rights are granted as in sections 120(8) and 137(a) of the CBCA. Unfortunately, the private right/corporate right distinction inherited from the common law memorandum and articles regime can still scare judges from opening up an easy remedy for shareholders.

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[22] Interestingly, Lord Reid notices the anomaly of his reasoning, which effect further curtails shareholders' remedies even worse than the common law but shifts the blame to the legislators. According to him, at 618;
"the dilemma of shareholders is, for we were given to understand that an application . . . under section 261 failed for want of leave. I respectfully draw this awkward situation to the attention of the legislature. It may well have been created by inadvertence and could be cured by a simple amendment".

[23] See B. Welling *supra*, note 13 at 551 - 552. See also, B. Welling, W.B. Rayner, and C. Jordan, *Canadian Corporate Law: Cases, Notes and Materials.* (Toronto: Butterworths, 1996) at 402.

[24] See R.L. Campbell, "Summary Enforcement of Directors' Duties: Re Goldhar and Quebec Manitou Mines Ltd" (1977) 2 CBLJ 92 at 96. See also, D.H. Peterson, *Shareholder Remedies in Canada* (Toronto: Butterworths, 1989) at 10.07 at para. 10.16. Peterson agrees however, that there may at times be situations where factual and legal issues may arise that can not be resolved in an interim application. In such cases, the court could use its discretion to refer the matter for trial. He cites the case of *Re Pemstar Holdings Ltd* (unreported *),* where the Ontario high Court in such a situation referred the matter to trial.

[25] [1994] BCJ No 1922 (B.C.S.C).

In short, the approach adopted in the *Goldhar* case leaves shareholders with a "medicine after death" therapy for managerial irresponsibility. This is contrary to the intention of the provisions. The Lawrence Committee, for example, in recommending the inclusion of the similarly worded restraining and compliance order in the Ontario statute in 1967, stated that it was "to enable a shareholder to make an appropriate application to the court without being required to wait until a statutory duty has been breached and a cause of action thereby possibly accruing to the shareholder either as an individual or a collective shareholders' right".[27]

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[26] *Ibid.* at 7.

IV. Shareholders' Personal Action Under Nigerian Law

As noted in Chapter Three, under the *Companies and Allied Matters Act*[28] (hereinafter the "CAMA"), the common law position has been codified. The four traditional exceptions under the rule in *Foss* v. *Harbottle*[29] have been codified in s. 300: Fraud on the company or the minority, breach of shareholders' personal rights, *ultra vires* transactions, and any purported act by an ordinary resolution which requires a special resolution. In addition, the principles underlying the "interest of justice considerations" which judges sometimes refer to have also been clearly provided for.[30] That is, a shareholder can sue in a personal action if it would be impossible to covey a meeting of shareholders to remedy a wrong to the corporation and where directors benefit or are likely to benefit from their own negligence or breach of duty.

As at common law, under the CAMA, a shareholder can only get an injunctive or declaratory relief.[31] Furthermore, a shareholder may be required to give security for costs although the court is empowered to award costs to the shareholder in appropriate cases.[32]

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[27] See *Interim Report of the Select Committee on Company Law* 1967 (Lawrence Report) at 81 para. 8.5.5. See also R.W.V. Dickerson, J.L. Howard and L. Getz, *Proposals for a New Business Corporations Law for Canada* (Ottawa: Information Canada, 1971)(Hereinafter the "Dickerson Report") at 167 para. 493. The Dickerson Report recommended the inclusion of the Ontario type compliance order though the section was "largely self explanatory" to empower the courts to "compel a director, officer, employer, agent or auditor of a corporation to comply with the draft Act, the regulations, the articles, by-laws or a unanimous shareholders' agreement, or to restrain those persons from acting in breach of the provisions contained in those documents."

[28] Cap. 59, Laws of the Federation of Nigeria, 1990.

[29] See Chapter Three, Part II and III.

[30] See CAMA., s. 300.

In addition, the CAMA also grants specific rights of action to shareholders to apply to court in specific circumstances. This includes: the right of a shareholder to apply to court to rectify the register of members if the name of any person is "entered in or omitted from the register of members" without sufficient cause,[33] the right of a shareholder to apply for the cancellation of a resolution altering the status of the company from a public company to a private company[34] and the variation of class rights.[35]

In comparison, there appears to be no difference in the effects of the CAMA provision and the compliance and restraining order of the CBCA. While the CAMA categorises six situations, these can be fully accommodated in the compliance order. The unclear distinction between personal rights/corporate rights is also applicable to both statutes.

However, there appears to be two distinctions between the CAMA and the CBCA: first, the group covered by the compliance order of the CBCA is wider than those covered by s. 300 of the CAMA. Under the CBCA, creditors are included in the class of people who can invoke the provision while under the CAMA, only shareholders are included.[36] Second, the available remedies under the CAMA are limited to injunctive and declaratory relief but under the s. 247 of CBCA, it appears that an applicant can recover money paid out in breach of the provisions of the Act since the Act, unlike the Nigerian provision, empowers the court to make "any further order it thinks fit."

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[31] *Ibid.*

[32] See CAMA ss. 301(3) and (4).

[33] See CAMA s. 90.

[34] See CAMA s. 53(3). Such shareholder must have not less than the 5% of the company's issued share capital.

[35] See CAMA s. 142.

[36] See CBCA s. 238 which defines complainant to include creditors but under s. 302 of the CAMA, only shareholders, their personal representatives or beneficial owners of shares can sue under section 300.

V. Shareholders' Personal Action Under the Division of Powers and the Memorandum and Articles of Association Models

Theoretically, the grievance procedure is usually regarded as one of the features that distinguishes the memorandum and articles of association model from the division of powers model. For the division of powers model, the right of a shareholder to sue in a personal action, according to many scholars, is granted simply by statute and not from any identifiable personal right of the shareholder. Conversely, in a memorandum and articles model, the right to sue in a personal action arises from the contract created thereby.[37] Professor Welling also argues that the compliance and restraining order are rules of procedure concerned only with standing and not with substantive rights.[38]

In the same way, the binding effect of the documents that constitute the corporate constitution in a division of powers model is also doubted. R.M. Ewasiuk, for instance, is of the view that:

> a provision placed in the By-laws of a corporation that is not specifically authorised by the Act is not enforceable either as against the corporation or the shareholders....[I]n the absence of a contract or of a statutory provision imposing the enforceability of such a provision, it is difficult to imagine any principle of law which would make such

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[37] See B. Welling, *supra* note 13 at 59.

[38] *Ibid.*

provisions binding in all cases.[39]

Welling's and Ewasiuk's analyses of this distinction place undue emphasis on the "contract" supposedly created by the memorandum and articles of association. In reality, the difference between the personal remedies of shareholders under the two models is largely artificial.[40] The contract created by the memo and articles is short of a true legal contract because it is subject to the overall provisions of the corporate statute and fundamental principles of corporations law. Put another way, it is not every provision therein that a shareholder can enforce in a personal action.

More importantly, even though the division of powers model does not contain the equivalent of the contract provision, there are several provisions in the CBCA that have the same effect. Section 122(2) of the CBCA, for instance, provides that "[e]very director or officer of a corporation shall comply with this Act, the regulations, articles, by-laws and any unanimous shareholder agreement"[41] This provision, when read with the compliance and restraining order provision manifests a jural relation among the parties to comply with the provisions (as if they were a binding contract between them). It would seem that the equivalent of a memo and articles contract is thereby created. The rights/procedure distinction made by Welling is of little relevance to the enforceability of such provisions because shareholders have the right to enforce every provision of the Act as well as by-laws, articles and the unanimous shareholder agreement by virtue of s. 247. It is not persuasive to argue that what is simply created is a procedure for a personal action which does not create any right for shareholders.

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[39] See "The Business Corporations Act- The Distinction Between Bye-Laws and Articles of Association" (1983) 21 Alta L. Rev. 381 at 381-382.

[40] This assertion and the analysis that follow is without prejudice, however, to the other differences that exist between the two types of corporate models. This analysis is from the context of remedies only.

[41] Such provision clearly counteracts the views of Ewasuik above.

At best, what could be tenably argued is that the division of powers model confers a stronger personal remedy on shareholders. This is based on the ground that from the wording of the compliance and restraining order, breach of any provision of the Act, articles, by-law and the unanimous shareholder agreement could be restrained. Unfortunately, the decision in *Re Goldhar* cuts back the potential power of s. 247.

Though it could be argued that the *Goldhar* distinction is important because it serves as a check against frivolous litigation while also giving directors and officers the free hand to run the corporation, the author's view is that there is a need to empower a shareholder to go to court to restrain a purported wrongful act before it occurs instead of the "medicine after death" approach taken by *Re Goldhar*. The possibility of abuse can also be checked by the fact that all such applications will still be subject to the procedural and substantive rules of the court concerning the granting of interim or interlocutory applications. These rules can be as rigid as the requirements for the derivative action.

VI. Personal Remedies in Context

Personal remedies under the Nigerian law remain clumsy and without clear boundaries because their application is likely to be confused by the proper plaintiff rule stated in s. 299. Apart from these legal defects, the problems of delay in Nigerian courts is a big set back for remedial forms of action. As seen above, a shareholder can only get a restraining or declaratory order as a personal remedy. Since he cannot get a compensatory order, the shareholder has to subsequently or concurrently apply for the oppression remedy or the derivative suit if he is seeking a pecuniary award. This is problematic. First, such a shareholder may not be able to get the restraining order in time to restrain whatever impugned conduct is sought to be restrained. Second, subsequently seeking the appropriate remedies will cause further delays that seriously compromise any compensatory relief. In short, delays in court cause serious economic hardship on litigants, especially in the Nigerian context where the inflation rate is high and unpredictable, and where more often that not, the value of monetary relief is less than the actual monetary value needed to achieve adequate compensation.

In such an environment, effective shareholder remedies require clear rules and simple procedures. This is to atone for the relative inexperience of the judiciary and the delays in court. Unfortunately, the personal remedies fall short of this deal. The ambit of the provisions are still unclear because the statute has codified the problematic common law principles discussed earlier and has created more room for ambiguity. Such ambiguity further complicates the law and procedure in this regard by paving way for endless litigation.

VII. The Administrative Powers of the Corporate Registry and Shareholders' Protection

The corporations law in both Nigeria and Canada provide additional protection to shareholders for control and supervision of management and prevention of oppressive conduct. This is in the wide powers conferred on the Director of the Corporate Registry in Canada (hereinafter the "Director") and the Corporate Affairs Commission in Nigeria (hereinafter the "CAC") to institute a derivative suit on behalf of the corporation or the oppression remedy.[42] In addition, special powers are conferred to carry out investigation into the affairs of a company. The Nigerian provision however differs from the Canadian counterpart in that the Director under CBCA has no direct power to conduct an investigation. It can only apply to court for an order of investigation or be appointed by the court on the application of a shareholder. This is different from the position in Nigeria as discussed below.

a. Powers of investigation under Nigerian corporate Law

Under the CAMA, the CAC is given general powers for the "regulation and supervision of the formation, incorporation, registration, management and winding up of companies",[43] and the power of "investigation into the affairs of any company where the interest of the shareholders and the public so demand."[44] In addition, the CAC is given specific powers to appoint inspectors to investigate the affairs of any company.[45]

The power to appoint an investigator by the CAC can be exercised on the application of a shareholder holding at least 1/4 of any class of shares issued by the company or by members constituting 1/4 of the total number of shareholders in the case of companies without share capital.[46] To activate this investigatory power, s. 314(3) requires that the shareholder presents to the CAC evidence showing good reasons for requiring investigation. It appears that the conduct required to meet this standard is conduct that is prejudicial to the shareholder.[47]

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[42] See CBCA s. 238 and the CAMA ss. 309 (c) -- definition of applicant for derivative suit and ss. 310(d) and 311(2)(c) on the right of the CAC to institute the oppression remedy -- on grounds of public interest. See generally Chapters Three and Four for full discussion of the two remedies.

[43] See CAMA s. 7(1)(a).

[44] See CAMA s. 7(1)(c).

[45] See CAMA ss. 314, 315 and 326.

[46] CAMA s. 314(2). In addition, this power can also be exercised on the direction of a court, s. 315(1), or *suo motu* by the CAC. See ss. 315(2) and 326.

The rules on appointments and proceedings are detailed in the CAMA.[48] Significantly, the shareholder cannot get substantive remedies from these provisions. The shareholder can only get a copy of the report of the investigation[49] though the commission could also institute an action under the derivative suit or the oppression remedy as the result of the investigation demands. The CAC is not given any power to remedy any wrong conduct if discovered. Court proceedings are required.

The investigatory power of the commission in the Nigerian context is praised because it makes substantial improvement on the provisions of the Nigerian *Companies Act* 1968.[50] It is also supported because it provides an avenue for shareholders to get enough information to formulate a claim for oppression or the derivative action as the case may be. Further, that it provides financially handicapped shareholders with the weapon to move the CAC to institute an action on their behalf,[51] and that the mere presence of the provisions may put errant directors in check.

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[47] This interpretation is made in view of the provisions of the CAMA s. 315(2)(a), which applies to the powers of the commission to appoint investigators on its own accord where *inter alia* the company's affairs are being conducted "in a manner that is unfairly prejudicial to some part of its members.

[48] See CAMA ss 316-322.

[49] CAMA s. 320(4)(iv). Such report is admissible in evidence in court, s. 325.

[50] Section 157 of the *Companies* act 1968 in Nigeria made provisions for investigation by the then Companies Registry. The section required security for payment of cost of the investigation. In addition, the conduct that could be investigated are those "oppressive" to some shareholders, a word that the judges interpreted strictly as seen in Chapter Four. The other defects of the 1968 investigation were that personal representatives and beneficial owners of share could not apply for an investigation. The definition of member under the CAMA has rectified that problem. For a comparison and analysis of the improvements of the CAMA over the 1968 Act, see C.O.Okonkwo, "The Corporate Affairs Commission" in E.O.Akanki ed., *Essays on Company Law* (Lagos: University of Lagos Press, 1992) 14 at 35.

In spite of the above merits, it is unfortunate however, that, the investigation option is not a remedy for minority shareholders as framed. This is because of the requirement that applicant must constitute 1/4 of the share holding or 1/4 of the total number of shareholders. Although the CAMA empowers the CAC to appoint investigators notwithstanding that the above requirement are not met,[52] that section applies only to investigation regarding ownership of a company. It is, however, submitted that since the CAC can appoint investigators on its own without prompting by any applicant, logically, its power to begin an investigation on the petition of an applicant can not be questioned on the ground that the required share holding has not been met.

b. Powers of investigation under Canadian corporate law

The Canadian provision is radically different from the Nigerian provision. Under the CBCA, the Director of the Corporate Registry (hereinafter the "Director") has no power to directly appoint investigators. The CBCA only empowers shareholders or the Director to apply to court for an order to investigate a company.[53] The investigator may be the Director or other persons as the court may decide.[54] The ground on which a court can order investigation are the same as the oppression remedy -- that the affairs or business of the company have or are been conducted in a manner that is oppressive, unfairly prejudice or disregards the interest of shareholders or some of them.[55] The CBCA also makes detailed provision for the proceedings and regulation of the investigation[56]

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[51] *Ibid.* at 36. But the CAC may require an applicant to pay part or the cost of the investigation. See CAMA s. 324(1)(c).

[52] See CAMA s. 326(3).

[53] See CBCA s. 229.

[54] See CBCA s. 230. This lists the orders that the court could make including the appointment of investigators and regulation of the investigation. Unlike the Nigerian provision, any shareholder can apply to court. See s.229(1).

Generally however, investigation as a remedy for shareholders serves no substantive purpose other than to get documents to establish oppression or mismanagement or both. But the option as a remedy for shareholders may be a long and delayed one. Under both the CAMA and the CBCA, the orders for investigation into the affairs of a company are specifically listed as one of the orders that can be obtained under the oppression action. Therefore, instead of going through to the court first to get an order for investigation, it may be easier to apply for the oppression action and obtain an order for investigation as a preliminary order. This way, the shareholder can obtain other orders to rectify any oppressive conduct that may be revealed from the investigation. This is however, not the case. The Canadian courts have heard that for an order for investigation under the oppression to be granted, the applicant has to estabilsh the oppression first, and second, establish that investigation is a proper remedy.[57] Therefore, the Canadian provision can be cumbersome and time consuming. Since the court may also appoint persons other than the Director, it may also be more expensive and time consuming than the Nigerian oppression remedy where the

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[55] CBCA ss. 229(1) and 241 and CAMA s. 311.

[56] See CBCA s. 231 - 237.

[57] See *Budd* v. *Gentra* (1997), O.J. No 5341.(QL) at 14-16, *Re Royal Trustco Ltd* No 3 (1981), 14 B.L.R. 307 at 311-314 and *Michalak* v. *Biotech Electronics Ltd.* (1986), 35 B.L.R. 1 at 14.

CAC pays for the investigation from its account.[58]

VIII. Investigatory Powers of Corporate Registry and the Socio-Economic, Political and Cultural Context

In spite of the risk that the investigation option is ultimately time wasting compared to the oppression remedy, there are some benefits when viewed from the socio-economic, political and cultural milieu. The Nigerian provision has an advantage over the Canadian provision because it does not require any order of court. This is particularly a useful innovation in light of the delays which characterises the Nigerian civil justice system. On the other hand, since the Canadian judicial system operates with relatively more speed, court involvement may reduce the potential and is therefore not a detriment.

The streamlined investigation remedy of the CAMA is still problematic even absent the need for a court application. Considering the large number of companies registered in the country, it is very difficult for the CAC to attend to the large number of petitions and then appoint investigators as may be required. This is because the CAC lacks the necessary facilities for speedy disposition of such matters. Another problem is that the investigation process is amenable to abuse by unscrupulous shareholders who make frivolous claims and influence the CAC personnel simply to embarrass other shareholders or directors.

Finally, considering the ownership structure of the Nigerian corporation as seen in Chapter Two, the requirement that an applicant must have 1/4 of the total share holding of the company or be 1/4 of the total number shareholders may set the bar unrealistically high for the less than 1/4 of the corporation's shareholders, thereby leaving them without access to an investigation. The situation is even more pronounced for public companies with a large number of shareholders. For such companies, because of the communication problems, it may be difficult for these shareholders to coordinate an attempt to activate the CAC to carry out an investigation. The shareholders who hold 1/4 or more of the corporate shares may be well able to protect their interests by disciplining managers and directors for any abuse by simply removing them with their voting powers.

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[58] This is notwithstanding the fact that the CAMA makes a provision that entitles the CAC to recover the money spent from the wrongdoers or apportion any part of the costs to the applicant. See CAMA s. 324.

Even with its potential deficiencies, the investigation option enables the court or the CAC as the case may be, to appoint experts versed in the business to examine the affairs of the company. This benefit alone makes a strong case for the investigation option as a welcome addition to the body of shareholder remedies

CONCLUSION

This thesis has sought to demonstrate, by comparison of shareholders' remedies in Nigeria and Canada, a fruitful theoretical and methodological approach to corporations law. This is no small matter since corporations law is a subject of high technical and complex orientation and regulates objects and ideas of immense importance to the general economic system.

Chapter One illustrated that corporate law theorising today reflects the ideological crisis in the legal academy. The chapter also sought to persuade that a universal theory of the purpose of corporations law is illusory. Though each theory explored in Chapter One stands as being uniquely persuasive, none is adequate when tested against the practical problems and objectives of economic development. The early fiction and real entity theories were mainly concerned with the nature of corporate existence and not the corporation's role in society. The classical liberal *laissez faire* view and the reformulated contract paradigm of the law and economics school provide useful analytical tools but their ideological position is impeachable for expecting too much from the marketplace in the way of disciplining managerial abuse. This is particularly true in a country like Nigeria where economic underdevelopment is the norm. The feminist critique and that offered by critical legal studies are also of limited assistance since they lack concern for "smaller" matters and thereby leave corporate problems and issues on the periphery. The post-modern approach is not equipped to answer questions concerning economic development and by definition it cannot provide a defined aim and standard for judging corporate principles and policies. Its emphasis on aesthetic considerations may not be very helpful in solving practical problems in corporate law.

This thesis also forwarded the proposition that the gap in corporations law theorising identified in Chapter One is filled by neo-pragmatism. By clearing the field, neo-pragmatism allows innovation to develop and permits scholars to advance the goal of development by a purposeful but eclectic gathering of ideas from all sources.

Chapter Two of the thesis examined the socio-economic, political and cultural environment of Nigeria. For example, Chapter Two revealed how the structure and operation of the general economy affect the ownership structure of the Nigerian corporation. It also showed that this structure creates special problems both for shareholders and the corporation itself including: high opportunistic behaviour by directors, corporate abuse, and oppressive behaviour by directors and officers. The agency cost analysis of the law and economics school proved useful in highlighting these problems but the real challenges of the Nigerian setting transcend the academic agency cost analysis. In fact, Chapter Two revealed several other social problems such as an inefficient judicial system, the absence of functioning infrastructure, communication problems, corruption and ethnic loyalty. These factors, as discussed in the chapter, have had a significant effect on corporate management and control. In a word, they make shareholders highly vulnerable in a market ill-equipped to provide the necessary discipline to the faithless, abusive director.

Taken together, Chapter One and Two established the basis for a contextual analysis of corporations law and facilitated the conclusion that in a developing country like Nigeria, the need for economic development calls for a certain amount of practicality within the context which a comprehensive understanding of problems relating to underdevelopment can provide. Through a contextual analysis, factors that perpetrate corporate abuse or that inhibit corporate growth and expansion are identified and a means for their potential resolution emerge. The neo-pragmatic attitude is of particular utility in this project because it leaves open the field on which the seed of development could be planted with reliance on diverse theoretical sources.

In line with the approach advanced in Part One of the thesis, Chapters Three to Five carried out a comparison of Canadian and Nigerian shareholders' remedies in their theoretical and contextual setting. Chapter Three examined the derivative action and assessed its effectiveness in solving the problems of managerial abuse faced by the shareholder of a Nigerian company. The chapter also revealed that the derivative action at common law was problematic which problems have largely been resolved in Canada. It also established that success on the Canadian front did not necessarily produce a similar outcome in Nigeria. Though purporting to follow the Canadian remedial approach, the CAMA has in fact carried into the new law some of the classic problems of the common law derivative action and has, unfortunately, even contributed new problems of its own. These include the re-introduction of the proper plaintiff rule and the majority rule in a controversial manner as well as the requirement of "wrongdoer control" as a condition for grant of leave to institute the derivative action.

Theoretical and contextual analysis further revealed that given the unique nature of managerial abuse in Nigeria and the lack of a fully mitigating regulatory mechanism, there is a high need for a well-drafted derivative action. This can be achieved by the amendment of ss. 299 and 300 of the CAMA to remove the wrong doer control requirement as a condition for grant of leave.

Unfortunately, the contextual analysis also revealed that even if the Nigerian derivative action were to be redrafted as suggested above, significant problems would still remain. This is because of the following factors which cannot be 'cured' through a simple fine-tuning of the remedial provisions in the CAMA:

a. Government representation on private /government owned companies create extra room for increased opportunistic behaviour;

b. The judicial system is so slow that the deterrent effect of the derivative action is limited;

c. Nigerian judges lack the necessary technical expertise to deal with derivative actions;

d. The absence of a good information and communications system in Nigeria creates extra room for opportunistic behaviour by directors and officers of companies;

e. The cost of litigation in an impoverished country like Nigeria may make entirely hypothetical even the best statutory derivative action; and

f. The Nigerian derivative action may have the propensity to generate strike suits as matters are not easily dispensed with by the courts.

In all, reform and rehabilitation on all fronts are required if corporations law generally, and remedies specifically, will be able to perform the important task of contributing to Nigeria's economic development. Put simply, if investors are going to invest in Nigeria, they require an effective means of redressing wrongs. An important step in this direction would be an improvement in judicial resources including the enhancement of research facilities and court room resources so as to improve the "turn around" period for litigation. The communications system would also have to be overhauled and, minimally, attempts should be made to reduce the other social problems attendant on Nigeria, such as corruption.

Another major problem identified through the contextual analysis of the Nigerian corporation is the matter of minority oppression. This results, in part, from the ownership structure of the corporation. Chapter Four also assessed how the problem of oppression has been tackled in a number of jurisdictions. The oppression remedy which was enacted in the Nigerian 1968 companies law was seriously defective because it simply copied the British oppression remedy without paying attention to the unique problems inherent in the Nigerian corporate environment. For instance, the oppression remedy emphasized the winding up of companies as a way of settling corporate disputes instead of encouraging corporate growth and expansion. This approach is simply not suitable for an economy that is in dire need of economic development. However, the new oppression remedy in Nigerian company law, which is copied from part of the Canadian oppression remedy, is commendable for eliminating this misguided approach.

The Canadian oppression remedy generally has been very successful, though there are still some areas where the courts have provided conflicting decisions concerning, for example, the relationship between the oppression remedy and the derivative action. Furthermore, it does not automatically follow that the Nigerian provision will be as successful as its Canadian counterpart has been. This is because the socio-economic, cultural and political factors discussed in Chapter Two also affect the operation of this remedy. That is, a contextual analysis revealed that a "made in Nigeria" approach is required for the Nigerian oppression remedy. While the Canadian judiciary adopts the 'reasonable expectation' concept, transplanting this kind of analysis to Nigeria needs careful consideration. First, in choosing the sources from which the expectations of the parties could be deduced, the judges would be well advised to consider the informal manner in which corporate transactions are conducted in Nigeria. That is, the memorandum and articles of association may not be a conclusive proof of shareholder expectation because, as seen in Chapter Two, many shareholders do not even know what is contained in these documents. Second, the need for economic development demands that where necessary, growth and expansion of the corporation should be given priority, even where this requires ownership and management changes which are contrary to the initial expectations of the shareholders.

Chapter Five considered two other remedies for shareholders, specifically the right of shareholders to institute an action to enforce personal rights derived from the corporation and the recourse to the courts (in the case of Canada) or to the Corporate Affairs Commission (in the case of Nigeria) to appoint investigators. With respect to both Nigeria and Canada, it was revealed that the personal action can be unreliable. There have been attempts by the judiciary to subject the remedy to the distinction between private rights and corporate rights as was the case at common law, and such distinction is inherently problematic. Furthermore, the CAMA poses the additional challenge of requiring judges to apply the common law "proper plaintiff" rule. The structural difficulties of the personal action in Nigeria -- namely delays in Nigerian courts -- was also identified as relevant to assessing the utility of the personal action. Chapter Five emphasized that the slow environment of Nigerian judiciary requires clear and simple corporate law rules which achieve as much certainty as possible. Regrettably, the few judicial decisions on point indicate that the relevant provisions of the CAMA are not well drafted and thereby create confusion. Without a fast and busy judiciary to clarify the rules, the personal action in Nigeria tends to languish.

The remedy of investigation on the other hand, as shown in Chapter Five, is a Nigerian necessity. It gives shareholders access to corporate information that may not otherwise be easily available. It also enables the court or the commission to appoint experts to examine the books of the company. However, Chapter Five also showed that investigation as a remedy is not overly effective to the extent that Nigeria is vulnerable to the social problems of corruption and ethnic loyalty.

In sum, this thesis showed that a comparative, contextual analysis of the Nigerian and Canadian law of shareholders' remedies is highly beneficial. It established that the Nigerian remedial provisions have no guarantee of success equal to that achieved in Canada. That is, it revealed contextually what the problems of the Nigerian corporation and its shareholders are and by so doing revealed how weaknesses in corporate law remedies could be corrected in order to achieve enhanced economic development in Nigeria. Following from these analyses, the author agrees with Professor Reinier Kraakman of Harvard and Bernard Black of Columbia that "effective corporate law is context-specific, even if the problems it must address are universal."[1]

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[1] See "A Self-Enforcing Model of Corporate Law" (1996) 109 Harvard L. Rev. 1911 at 1914.

BIBLIOGRAPHY

I. BOOKS

Akanki E.O., ed., *Essays on Company Law* (Lagos: University of Lagos Press, 1992).

American Law Institute, *Principles of Corporate Governance: Analysis and Recommendation* (Final Draft March 1992) (Philadelphia: ALI, 1992).

Baran P. and Sweezy P., *Monopoly Capital* (New York: Monthly Review Press, 1966).

Barry N.P., *On Classical Liberalism and Libertarianism* (Houndmill: Macmillan Press, 1989).

Bartlett A. *Pride, Power and Prejudice* (Ashford Press, 1987).

Bearle A. and Means G., *The Modern Corporation and Private Property,* rev.ed. (New York: Harcourt, Bruce and World, 1968).

Buckley F.H.,*Coporations, Principles and Policies* (Toronto: Emond Montgomery, 1995).

Calabresi G., *The Cost of Accidents* (Brown, 1970).

The New Economic Analysis of Law, Scholarship, Sophistry or Self Indulgence? Macabre Lectures in Jurisprudence 1981, (London: Oxford University Press, 1981).

Carr. C.T., *The General Principles of the Law of Corporations* (Cambridge: University Press, 1905).

Cheffins B.R., *Company Law Theory, Structure and Operations* (Oxford: Clarendon Press, 1997).

Dais R.W.M., *Jurisprudence* 5th ed. (London: Butterworths, 1985).

Danley J.R., *The Role of Modern Corporation in a Free Society* (London: University of Notre Dame Press, 1994).

Davies P.L., ed., *Gower's Principles of Modern Company Law*, 6th ed. (London: Sweet& Maxwell, 1997).

De Cruz P., *A Modern Approach to Comparative Law* (Deventer: Kluver, 1993).

Comparative Law in a Changing World (London: Cavendish, 1995).

Devlin R.F., ed., *Canadian Perspectives on Legal Theory* (Toronto: Emond Montgomery, 1991).

Dickerson R.W.V., Howard J.L. and GetzL., *Proposals for a New Business Corporations Law for Canada* (Ottawa: Information Canada, 1971).

Elias T.O., *Law in a Developing Society* (Benin City: Ethiope Pub. Corp., 1972).

Federal Office of Statistics, *Annual Abstract of Statistics* 1997 Ed. (Abuja: Fed. Office of Statistics, 1997).

Fitzpatrick P. and Hunt A., eds., *Critical Legal Studies* (Oxford: Basil Blackwell, 1987).

Freeman M.D.A., ed., *Lloyd's Introduction to Jurisprudence* 6th ed. (London: Sweet & Maxwell, 1994).

Gower L.C.B., *Final Report of the Commission of Enquiry into the Working and Administration of the Present Company Law of Ghana* (London, 1961).

Hart H.L.A., *Definition & Theory in Jurisprudence* (Oxford: Clarendon Press, 1953).

Hurst J.W., *The Legitimacy of the Business Corporation in the Law of the United States 1780-1970* (Charlottesville: University Press of Virginia, 1970).

Institute of Law research and Reform, *proposals for a New Alberta Business Corporations Act* (Report No 36) (Edmonton: ILRR, 1980).

International Finance Corporation, *Emerging Stock Market Factbook 1997* .

International Legal Centre, *Law and Development: the Future of Law and Development Research* (Sweden: ILC, 1974).

Kachikwu E.I. *Nigeria Foreign Investment Law and Policy* (Lagos: Mikzek Law Publications, 1988).

Kairys D., ed., *The Politics of Law, A Progressive Critique* rev. ed. (New York: Pantheon Books, 1990).

Law Commission (Britain), *Shareholder Remedies, A Consultation Paper* (Consultation Paper No 142 (London: Stationery office, 1996).

Malloy R.P. and Evensky J., eds., *Adam Smith and the Philosophy of Law and Economics* (Dordrecht: Kluwer Academic Publishers, 1994).

Marasinghe M.L. and Conklin W.E., eds., *Essays on Third World Perspectives in Jurisprudence* (Singapore: Malayan Law Journal Pte, 1984).

Nigeria Economic Society, ed., *Nigerian Economy: A Political and Economy Approach* (London: Longman, 1986).

Nigerian Law Reform Commission, *Working Papers on the Reform of Nigerian Company Law* (Vol. 1: Review and Recommendations) (Lagos: NLRC, 1989).

Nwabueze B.O., *Federalism in Nigeria under the Presidential Constitution*(London: Sweet & Maxwell, 1983).

Ogus A.I., and Veljanovski C.G., eds., *Readings in the Economics of Law and Regulation* (Oxford: Clarendon Press, 1984).

Okonkwo. C.O., *Contemporary Issues in Nigeria Law* (Lagos: Taiwo Fakoyede, 1992) .

Olukoshi A., *Economic Crisis, Structural Adjustment and the Coping Strategies of Manufacturers in Kano, Nigeria* (Discussion Paper presented to the United Nations Research Institute for Social Development) (Geneva: UNRISD, 1996).

Onosode G., *Three Decades of Development Crisis in Nigeria* (Lagos: Malthouse Press, 1993).

Ontario Legislative Assembly, *Interim Report of the Select Committee on Company Law* 1967.

Orojo J.O., *Company Law and Practice in Nigeria* 3rd. ed. (Lagos: Mbeyi & Associates, 1992).

Patterson, D. ed., *Postmodernism and Law* (The International Library of Essays in Law and Legal theory Schools 14), (New York: New York University Press, 1994).

Pennington R.R., *Company Law* 7th ed. (London: Butterworths, 1995).

Peterson D.H., *Shareholder Remedies in Canada* (Toronto: Butterworths, 1989).

Posner R., *Economic Analysis of Law* 3rd ed. (Boston: Little Brown,1986).

Romano R. *The Genius of American Corporate Law* (Washington, D.C: A.E.I. Press, 1993).

Romano R., ed. *Foundations of Corporate Law* (New York: Oxford University Press, 1993).

Seidman A. and Seidman R.B., *State and Law in the Development Process:Problem Solving and Institutional Change in the Third World* (New York: St. Martin's Press, 1994).

Unger. R.M., *The Critical Legal Studies Movement* (Cambridge: Harvard University Press, 1983).

VanDuzer J.A., *The Laws of Partnership and Corporations* (Concord: Irwin Law, 1997) at page 255.

Welling B. Rayner W.B. and Jordan C., *Canadian Corporate Law: Cases, Notes and Materials* (Toronto: Butterworths, 1996).

Yesufu T.M., *The Nigerian Economy: Growth Without Development* (Benin City: Benin Social Science Series for Africa, 1996).

Zartman I.W., ed., *The Political Economy of Nigeria* (New York: Praeger, 1983).

Ziegel J.S., Daniels R.J. and MacIntosh J.G., *Cases and Materials on Partnerships and Canadian Business Corporations* (3ed.) Vols. 1 and 2, (Toronto: Carswell, 1994).

Ziegel J.S. *Studies in Canadian Company Law* Vols. 1 and 2, (Toronto: Butterworths, 1967).

II. ARTICLES

Achebe I., "The legal Problems of Indigenisation in Nigeria: A Lesson for Developing Countries." (1989) 12 Hasting Int'l. & Comp. L. Rev. 633.

Ahmed A., "The Current State of the Nigerian Economy and its Challenges to Policy Makers" (1985) Central Bank of Nigeria, Economic and Financial Review Vol. 23 (No 3) 12.

Ahunwan B.U., "The Corporation as a Woman: Reflections on the Feminist and other Interdisciplinary Formulations for a Corporate Law Ideology" Paper presented at a conference on *Law's Interchanging Territories* at the University of British Columbia, Vancouver on 29 and 30 April, 1998 (Unpublished).

Akanki E.O., "Controlling the Vagaries of Democracy in Companies" (1988) 15 Nig. J. Contemp. Law 111.

"Company Directors' Responsibility" delivered at a seminar entitled *The Role of Company Secretary in Corporate Management* at the Federal Palace Hotel, Lagos, Nigeria. 25 October, 1994 (Unpublished).

Allen W.T., "Contract and Communities in Corporation Law" (1993) 50 Wash Lee L. Rev. 1395.

Bartlett K., "Feminist legal methods" (1989) 103 Harv.L.R at 829.

Baxter A., "The Derivative Action under the Ontario Business Corporations Act: A Review of Section 97" (1982) 27 McGill L.J. 453.

Beck S., "The Shareholders' Derivative Action" (1974) 52 Can. Bus. Rev. 159.

Black B. and Kraackman R., "A Self Enforcing Model of Corporations Law" (1996) 109 Harvard L.R. 1911.

Brudney V., "Corporate Governance, Agency Costs and the Rhetoric of Contract" (1985) 85 Columbia L.R.1403.

Buckley F.H., "Ratification and the Derivative Action Under the Ontario Business Corporations Act" (1976) 22 McGill L.J 167.

Campbell R.L., "Summary Enforcement of Directors' Duties: Re Goldhar and Quebec Manitou Mines Ltd" (1977) 2 CBLJ 92

Carry W., "Federalism and Corporate Law: Reflections Upon Delaware" (1974) 83 Yale L.J. 663.

Chapman J.T., "Corporate Oppression: Structuring Judicial Discretions." (1996) 18 The Advocate Quarterly 170.

Cheffins B., "The Oppression Remedy in Corporate Law: The Canadian Experience" [1988] U. Pa.J. Int'l. Bus. Law 305.

"An Economic Analysis of the Oppression Remedy: Working Towards a More Coherent Picture of Corporate Law" (1990) 40 U.T.L.J. 775.

Coffee J.C. Jnr. And Schartz D.E., "The Survival of the Derivative Suits: An Evaluation and a Proposal for Legislative Reform" (1981) 81 Colum. Law Rev. 261.

Cohen R., "Feminist Thought and Corporate Law: It's Time to Find our Way up from the Bottom (Line)" (1984) 2 Am. U. J.Gender & L. 1.

Comments," Corporate Responsibility For Litigation Expenses of Management" (1952) 40 Cal. L. Rev. 104.

Cox J.D., "Compensation, Deterrence, and the Market as Boundaries For Derivative Suit Procedures" (1983-84) 52 Geo. Wash L. Rev. 745.

Daniels R.J. and Halpern P., "Too Close for Comfort: The Role of the Closely Held Public Corporation in the Canadian Economy and the Implications for Public Policy" (1996) 26 Can. Bus. L.J. 11.

Decker A.E., " Women in Corporate Law: Rewriting the Rules." (1996) 4 Am. U. J. Gender & L. 511.

DeCoste. F.C., "Taking a Stand: Theory in the Canadian Legal Academy" Book Review of R.F. Devlin, *Canadian Perspective on Legal Theory*, (1991) 29 Alta L. Rev. 941.

Demott D.A., "Oppressed But Not Betrayed: A Comparative Assessment of Canadian Remedies for Minority Shareholders and Other Corporate Constituents" (1993) 56 Law and Contemp. Problems 181.

Dewey. J., "The Historic Background of Corporate Legal Personality" (1925/26) 35 Yale L. J. 655.

Dodd E.M., "For Whom are Corporate Managers Trustees" (1931/32) Harvard L.Rev. 1145.

Dworkin R.M., "Is Wealth a Value?" (1980) 9 J. Legal Stud. 191.

Dyer V.A.E., "Derivative and Oppression Actions: Are They Mutually Exclusive?" (1993) 1 Roland on Corporate Litigations" (No.2) 14.

Ewasiuk R.M., "The Business Corporations Act - The Distinction Between By-laws and Articles of Association" (1983) 21 Alta L.Rev. 381.

Fischel D.R. and Bradley M., "The Role of Liability Rules and the Derivative Suits in Corporate Law: A Theoretical and Empirical Analysis" (1985/86) 71 Cornell L. Rev 261.

Fischel D.R., "The "Race to the Bottom" Revisited, Reflections on Recent Developments in Delaware Corporations Law" (1982)Nw. U.L.Rev. 913.

Fitch R. and Oppenheimer M., "Who Rules the Corporation" Part 1, 11 and 1V. (1970) Socialist Vol. 4, 73 and Vol. 5, 30.

Frug G.E., "The Idea of Bureaucracy in American Law" (1983) 97 Harvard L.R. Pt. 2 1277.

Fung G.M., "A Common Goal from two Different Paths: Protection of Minority Shareholders in Delaware and Canada" (1993) 57 Albany L. Rev. 41.

Gabaldon T.A., "The Lemonade Stand:Feminist and Other Reflections on the Limited Liability of Corporate Shareholders" (1992) 45 Vand. L.Rev 1386.

Galanter M. and Edward M.A., " Introduction: The Path of The Law Ands" [1997] Wisconsin Law Rev. No 3, 375.

Geldart W.M., "Legal Personality" (1911) 27 LQR 90.

Gevutz F.A., "Who Represents the Corporation: in Search of a Better Method for Determining the Corporate Interest in Derivative Suits" (1984/85) Un.of Pittsburgh L.Rev. 265.

Herzl and Katz, "*Smith* v. *Van Gorkam*: The Business of Judging Business Judgement' (1986) 41 Business Lawyer 1187.

Horwitz M.J., "*Santa Clara* Revisited: The Development of Corporate Theory" (1985/86) 88 W. Va. L. Rev. 173.

Hunt A., "The Big Fear: Law Confronts Post modernism" (1990) 35 McGill L. J 507.

Hutchinson A.C. and Petter A., "Private Rights/Public Wrongs: The Liberal Lie of the Charter" (1988) 38 UTLJ 278.

Ireland P., "Corporate Governance, Stakeholding, and the Company: Towards a Less Degenerate Capitalism" (1996) 23 Jour. L.& Soc. 287.

Jeffrey R.J. and Machintosh G., "Towards a Distinctive Canadian Corporate Law Regime" (1991) 29 Osgoode Hall L. J. 863.

Johnson L., "New Approaches to Corporations Law" (1993) 50 Wash & Lee L. Rev. 1713.

Lahey K.A. & Salter S.W., "Corporate Law in Legal Theory and Legal Scholarship: From Classicism to Feminism" (1985) 23 Osgoode Hall L.J. 543.

Lake P.F., "Posner's Pragmatist Jurisprudence" (1994) 73 Nebraska L.Rev. 545.

Leung W.S.W., "The Inadequacy of Shareholder Primacy: A Proposed Corporate Regime that Recognises Non-shareholder Interests" (1997) 30 Columbia J.L.& Soc. Prob. 587 at 624.

Littleton C.A., "Reconstructing Sexual Equality" (1987) 75 Cal.L.Rev.1274.

"Feminist Jurisprudence: The Difference Method Makes" (1988/89) 41 Stan. L.Rev. 751.

Machen. A.W, Jnr., "Corporate Personality" (1910-11) 24 Harvard L. R. 253.

MacIntoch J.G., "Minority Shareholders' Rights in Canada and England 1860- 1987" (1989) 27 Osgoode Hall L.J. 561.

"Bad faith and the Oppression Remedy: Uneasy Marriage, or Amicable Divorce? (1990) 69 Can. Bar. Rev. 276.

"The Oppression Remedy: Personal or Derivative?" (1991), 70 Can. Bar Rev. 29.

Maloney M.A. "Whither the Statutory Derivative Action" (1986) 64 Can. Bar Rev. 308.

Manning B., "Reflections and Practical Tips on Life in the Boardroom After Van Gorkam" (1985) 41 Business Lawyer 1.

Martin-Kaye N., "The Theoretical Basis of Modern Company Law" [1976] Jour. Bus. Law 235.

Matsuda M.J., " Pragmatism Modified and the False Consciousness Problem" (1990) 63 S. Cal. L. Rev. 1763.

MetSezger M.B. and Dalton D.R., "Seeing the Elephant: An Organizational Perspective on Corporate Moral Agency" (1995/96) 33 Am. Bus.L. J. 489.

Miller S.K., Minority Shareholder Oppression in the Private Company in the European Community: A Comparative Analysis of Germany, United Kingdom, and the French." (1997) 30 Cornell Int. L.J. (No 2) 381.

Millon. D., "Theories of the Corporation" [1990] Duke L.J. 201.

Nnona C., "The Requirements of Company Incorporation in Nigeria Law: An Analysis of Underlying Philosophies" (1995) Africa J. of Int.& Comp. Law 568.

Notes, "When Should Courts Allow Settlement of Duty-of-Loyalty Derivative Suits" (1996) 109 Harvard L. Rev. 1084.

O'Byrne S.K., "Legal Criticism as Storytelling" (1991) 23 Ottawa L. Rev. 487.

Olufon G.K., "The Central Securities Clearing System and the Over the Counter Stock Market: Legal, Commercial and Ownership Issues Arising" (1997) 2 Modus Int. L. & Bus. Qtr. (N0 4) 21.

Orts E.W., "The Complexity and Legitimacy of Corporate Law" (1993) 50 Wash & Lee L. Rev. 1565.

Ottenbreit K.G. and Walker J. "Learning from the Delaware Experience: A Comparison of the Canadian Business Corporations Act and the Delaware General Corporation Law" (1998) 29 CBLJ 364.

Pickering M.A., "Shareholders' Voting Rights and Company Control" (1965) 81 L.Q.R. 249.

Pollock. F., "Has the Common Law Received the Fiction Theory of Corporations?" (1911) 27 LQR. 219.

Posner R.A., "Utilitarianism, Economics, and Legal Theory" (1979) 8 J. Legal Stud. 103.

"What has Pragmatism to offer Law" (1990) 63 S. Cal. L. Rev. 1653.

Prunty B.S. Jr., "The Shareholders Derivative Suit: Notes on its Derivation." (1957) 32 N.Y.U.L.Rev. 980.

Ramsay I., "Corporate Governance, Shareholders' Litigation and the Prospects for a Statutory Derivative Action" (1992) 15 U.N.South Wales L.J. 149.

Rees S., "Company Law's Role in Economic Development: the French Approach" (1994) 68 A.L.J. 777.

Rhode D.L., "Feminist Critical Theories" (1990) 42 Stan. L. Rev. 617.

Riley C.A., "Understanding and Regulating the Corporation" (1995) 58 Mod.L.Rev.591.

Romano R., "Answering The Wrong Question: The Tenuous Case for Mandatory Corporate Laws" (1989) 89 Columbia L.R. 1599.

Rorty R., "The Banality of Pragmatism and Poetry of Justice." (1990) 63 S.Cal.L. Rev. 1811.

Scales A.C., "The Emergence of Feminist Jurisprudence: An Essay" (1985/86) 95 Yale L.J. 1373.

Schwartz " In Praise of Derivative Suits: A Commentary on the Paper of Professor Fischel and Bradley" (1985/86) 71 Cornell L.Rev. 322.

Scott K., "The Role of Preconceptions in Policy Analysis in Law: A Response to Fischel and Bradley" (1985/86) 71 Cornell L. Rev. 299.

Singer J.W., "Property and Coercion in Federal Indian Law: The Conflict between Critical and Complacent Pragmatism" (1990) 63 S.Cal. L. Rev.1822.

Smith R., "Shareholders' Derivative Suits and Shareholders' Welfare: An Evaluation and Proposal" (1982/83) N.W.Uni.L.Rev. 856.

Smith J.M., "The Role of the Attorney in Protecting (and Impairing Shareholder Interest: Incentives and Disincentives to Maximize Wealth" (1997) 47 Duke L.J. 161.

Solomon L.D. and Collins K.J., " Humanistic Economics: A New Model for the Corporate Social Responsibility Debate" (1986/87) 12 J. Corp. Law 331.

Solomon L.D., " On the Frontier of Capitalism: Implementation of Humanomics by Modern Publicly Held Corporations: A critical Assessment." (1993) 50 Wash and Lee Law Rev.1625.

Stanley C., "Corporate Personality and Capitalist Relations: A Critical Analysis of the Artifice of Company Law" (1988) 19 Cambrian L. Rev. 97.

Stanley C., "The Conceptual Foundations of Modern Company Law" (1987) 14 Jour. Law& Soc. 149.

Stapledon G.P., "Use of the Oppression Provision in Listed Companies in Australia and the United Kingdom." (1993) 67 Australia L.J. 575.

Sugarman D., "Reconceptualising Company Law: Reflections on the Law Commission's Consultation Paper on Shareholder Remedies" (1997) 18 The company Lawyer 226.

Wedderburn K., "Shareholders' Rights and the Rule in Foss v. Harbottle" (1957) Camb. L. J. 93.

"Shareholders' Rights and the Rule in Foss v. Harbottle" (1958) Camb. L. J 194.

West R., "Jurisprudence and Gender" (1988) 55 Un. Chicago L. Rev. 1.

West.C., "The Limits of Neopragmatism" (1990) 63 South Cal. L. Rev.1747.

Wood R.J., Brown M.T. and Bauman R.W., "Modifications To Corporate Constitutions in Alberta: An Empirical Study" (1993) 31 Alta L. Rev. 263.

III. STATUTES

Companies Act (Alberta), R.S.C. 1970 c. 60.

Companies Act (British Columbia) RSBC 1979 c. 59.

Canada Act 1982 (U.K.), 1982, c. 11.

Canada Business Corporations Act R.S.C. 1985, c. C-44.

Companies Act 1948 (British).

Companies Act Cap. 6 1985 (British).

Companies Act 1968,). S.I. 1980 No 13.(Nigeria).

Companies and Allied Matters Decree 1990, redesignated as *Companies and Allied Matters Act,* 1990 Cap.59, Laws Of The Federation Of Nigeria 1990.

Companies Act RSBC 1973 cap. 59, s. 224. British Columbia).

Constitution of the Federal Republic of Nigeria 1979.

Corporations Law, 1981, Cap. 89 Australia.

Nigerian Enterprises Promotion (Issue of Non- Voting Equity Shares) Decree 1987 Cap. 304 Laws of the Federation of Nigeria, 1990).

Nigerian Investment Promotion Commission Decree, No 16, 1995.

Nigerian Enterprise Promotion Decree, No 3 1977.

Nigerian Enterprise Promotion Decree, No 4, 1972.

IV. CASES

Goldex Mines v. Revill (1974), 7 O.R. (2d) 216 (Ont. C.A.).

Re Goldhar and Quebec Manitou Mines (1975), 61 D.L.R. (3d.) 612 (Ont.Div.Ct).

Ogunade v. *Mobile Farms* (1976), 2 FRCR 101. (Nig. H.C.).

Bank of Montreal v. *Dome Petroleum (*1987), 54 Alta .L.R. (2d) 289.

Ontario Sec. Comm. v. *Mclaughlam* (1988), 11 O.S.C.B. 443 (Ont. H.C.).

Brant Investments v. *KeepRite* (1991), 80 D.L.R. (4th) 161.(Ont. C.A.) .

Pappas v. *Acam Windows* (1991), 2 B.L.R. (2d) 180 (Nfld. S.C. T.D.).

820099 Ontario v. *Harold Ballard* (1992), 3 B.L.R. (2d) 113 (Ont. Gen. Div.).

Twiggco Fin. v. *Peat Marwick* (1994), 12 B.C.J. (2d) 1.

Farnham v. *Fingold,* (1973] 2 O.R. 132 (C.A.).

Jacobs Farms v. Jacob (1992), 32 A.C.W.S. (3d) 549 (Ont. Gen. Div.).

Abraham v. Prosoccer (1980), 31 O.R. (2d) 475 (H.C.).

Allen v. Gold Reefs of West Africa ltd, [1900] 1 Ch. 656, (C.A.).

Armstrong v. *Gardiner* (1978), 20 O.R. (2d) 648 (Ont.H.C.).

Ashbury Railway Carriage and Iron Co. v. Riche, [1875] L.R. 7 H.L. 653.(H.L.).

Atwool v.Merryweather (1867), L.R. 5 Eq. 464n..

Beattie v.Beattie, [1938] Ch.708.

Bonaza Creek Gold Mining Co. v. The King, [1916] 1 A.C. 566 (H.L.).

Brant Investments Ltd. v. *Keeprite Inc.* (1991), 80 D.L.R. (4th) 161. (Ont.C.A.).

Budd v. Gentra (1997), O.J. No 5342.(QL).

Burt v. Mclaughlan (1993), 133 A.R. 91 (Alta. Q.B.).

C.W. shareholders Inc. v. WIC Western Int. Comm. Ltd. 1998 O.J. No., 1886 (ont. Ct. GD).

Cook v. Deeks, [1916] 1 A.C. 554 (H.L.).

Daniels v. Daniels, [1978] 2 W.L.R. 73 (Ch.).

Dartmouth College v. Woodward (1819) 4 Wheat. 518.

Dodge v. Ford Motors Co. 204 Mich. 459, 507 (1919).

Ebrahimi v. Westborne Galleries [1972] 2 ALL E. R. 492(H.L.).

Edokpolor v. Sem Edo Wire Industries, [1975] S.C. 119 (Nig. S.C.).

Edward v. Halliwell, [1950] 2 All E. R. 1064 (C.A.).

Elder v. Elder and Watson Ltd., [1952] S.C 49 at 55 (H.L.Eng.).

Eley v. Positive Government Security Life Assurance Co (1876), 1 Ex.D. 88.

F.A.T.B. v. Ezegbu, [1994] 9 NWLR 150 (C.A.Nig.).

Foss v. *Harbottle* (1843), 2 Hare 461 (H.L.).

Gillis v. Johnson Corp. (1996), 138 NF.&PEIR 135 at 137-139.

Greenhaugh v. Arderne Cinemas, Ltd., [1951] Ch. 286 at 291 (C.A.).

Hodgson v. *NALGO*, [1972] 1 WLR 130.

Hutton v. West Cork Railway Co (1883), 23 Ch.D 654 at 673. (CA).

Jababe v. Abalmark Inc. (1996) O.J. 2609. (Ont.C.A.).

Journet v. Superchef Food Industries Ltd. (Unreported, Que.S.C., 1984), reported in Ziegel supra 8 at 1210.

Kehinde v. Registrar of Companies, [1979] L.R.N.213(H.C.).

Lasisi v. Registrar of Companies, [1976] 7 S.C. 73 (S.C. Nig).

M.A.Omisade v. Harry Akande, [1987] 2 NWLR 156.(S.C. Nig.).

Macdougal v. Gardiner (1875), 1 Ch.D. 13 (C.A.).

Michalak v. Biotech Electronics Ltd. (1986), 35 B.L.R. 1.

Nameff v. Concrete Holdings Ltd. (1995), 23 O.R. (3d) 481 (C.A.).

Nicholas v. Soundcraft Electronics Ltd. [1993] BCLC 360.

Northwestern Corp. v. Beatty (1887), 12 App. Cas. 589 (H.L.).

Palmer v. Carling O' Keefe Breweries (1989), 67 O.R. (2d) 161 (Ont. Div.Ct.).

Pavlides v. Jensen, [1956] Ch.565 (Ch.D.).

Pepper v. Litton 308 U.S. 295 at 306.

Prudential Ass. V. *Newman,* [1982] 1 All E.R. 354 (C.A.).

Regal (Hastings) v. *Gulliver,* [1942] 1ALL E.R. 378(H.L.).

Re H.R. Harmer Ltd, [1959]1 WLR 62. (C.A.).

Re Royal Trustco Ltd No 3 (1981), 14 B.L.R. 307.

Re H.R. Harmer Ltd, [1959]1 WLR 62. (C.A.).

Re Farmat Produce and Shipping Line Ltd. (1964) 2 A.L.R.Comm. 247 at 252.(Nig. H.C.).

Re Five Minute Car Wash Service Ltd supra, [1966] 1 WLR 745 (Ch.).

Re Bellman and Western Approaches Ltd (1981), 33 B.C.L.R. 45 (C.A.).

Re Overton Holdings Ltd[1985] W.A.R. 224.

Re Besenski (1981), 15 Sask.R.182 (Q.B.).

Redecop v. *Robco Construction Ltd.* (1978), 5 B.L.R. 58 at 68. (B.C.S.C.).

Regal (Hastings) Co Ltd v. *Gulliver,* [1942] 1 All E.R. 378. (H.L.).

Roman Corp. v. *Peak Marwick Thorne* (1994),12 BCL (2d) 1 (Ontario Gen.Div.)

Russel v. *Wakefield Waterworks Co,* [1875] L.R. 20 Eq. 474.

Salmon v. *Quinn and Axten,* [1909] 1 Ch. 311.

Salomon v. *Salomon* (1843) 2 Hare 461.(Ch.).

Shield Dev. v. Snyder, [1976] 3 W.W.R. 44 (B.C.S.C.).

Sparling v. *Javelin,* [1986] R.J.R. 1073.

*Scottish Coop. Wholesale Soc.*v. *Meyer,* [1959] A.C. 324 (AC).

Smith v. *Van Gorkam*, 488 A.2d. 858 (Del.SC 1985).

Smith v. Croft (No 1), [1986] 1 W.L.R. 580. (Ch.).

Smith v. Croft (No 2), [1986] 3 ALL. E.R. 909 (Ch.D*).*

Surowitz v. Hilton Hotels Corp. 393 U.S 363 (1966*).*

Towers v. African Tug Co, [1904] 1 Ch.558. (Ch*).*

Tsui v. Int. Cap. Coop., [1993] 4 W.W.R. 613.

Turner v. Mailhot (1985), 50 O.R. (2d) 561 (H.C.).

Vadeko Int. Inc v. Philosophe (1990), 1 O.R. (3d) 87 (Ont. Gen. Div.).

Wallerstener v. Moir (1974), (1974) QB 373 (C.A.).

Westfair Foods Ltd. v. Watt (1991) 5 B.L.R. (2d) 160 at 166. (Alta. C.A.).

Wood v. Odessa, [1889] 42 Ch.D 636.

Yalaju Amaye v. Associated Reg.Eng. Contractors, [1990] 4NWLR 423 (Nig. S.C.).

APPENDIX A

Federal Republic of Nigeria
Official Gazette

No. 2 **Lagos - 9th January, 1990** **Vol. 77**

Government Notice No. 9

The following are published as supplement to this *Gazette* :—

Short Title	*Page*
Decree No. 1 Companies and Allied Matters Decree 1990	A 1

• • •

PART X—PROTECTION OF MINORITY AGAINST ILLEGAL AND OPPRESSIVE CONDUCT

Action by or against the company

Only company may sue for wrong or ratify irregular conduct.

299. Subject to the provisions of this Decree, where irregularity has been committed in the course of a company's affairs or any wrong has been done to the company, only the company can sue to remedy that wrong and only the company can ratify the irregular conduct.

Protection of minority : injunction and declaration in certain cases.

300. Without prejudice to the rights of members under sections 303 to 308 and sections 310 to 312 of this Decree or any other provisions of this Decree, the court, on the application of any member, may by injunction or declaration restrain the company from the following—

(*a*) entering into any transaction which is illegal or *ultra vires* ;

(*b*) purporting to do by ordinary resolution any act which by its constitution or the Decree requires to be done by special resolution ;

(*c*) any act or omission affecting the applicant's individual rights as a member ;

(*d*) committing fraud on either the company or the minority shareholders where the directors fail to take appropriate action to redress the wrong done ;

(*e*) where a company meeting cannot be called in time to be of practical use in redressing a wrong done to the company or to minority shareholders ; and

(*f*) where the directors are likely to derive a profit or benefit, or have profited or benefited from their negligence or from their breach of duty.

Personal and representative action.

301.—(1) Where a member institutes a personal action to enforce a right due to him personally, he shall not be entitled to any damages but to declaration or injunction to restrain the company and/or the directors from doing a particular act.

(2) Where a member institutes a representative action on behalf of himself and other affected members to enforce any rights due to them, he shall not be entitled to any damages but to a declaration or injunction to restrain the company and/or directors from doing a particular act.

(3) Where any member institutes an action under this section, the court may award costs to him personally whether or not his action succeeds.

(4) In any proceedings by a member under section 300 of this Decree, the court may, if it thinks fit order that the member shall give security for costs.

Definition of member.

302. For the purpose of sections 300 and 301 of this Decree, "member" includes—

(*a*) the personal representative of a deceased member ; and

(*b*) any person to whom shares have been transferred or transmitted by operation of law.

Commencing derivative action.

303.—(1) Subject to the provisions of subsection (2) of this section, an applicant may apply to the court for leave to bring an action in the name or on behalf of a company, or to intervene in an action to which the company is a party, for the purpose of prosecuting, defending or discontinuing the action on behalf of the company.

(2) No action may be brought and no intervention may be made under subsection (1) of this section, unless the court is satisfied that—

(*a*) the wrongdoers are the directors who are in control, and will not take necessary action ;

(*b*) the applicant has given reasonable notice to the directors of the company of his intention to apply to the court under subsection (1) of this section if the directors of the company do not bring, diligently prosecute or defend or discontinue the action ;

(*c*) the applicant is acting in good faith ; and

(*d*) it appears to be in the best interest of the company that the action be brought, prosecuted, defended or discontinued.

Powers of the Court.

304.—(1) In connection with an action brought or intervened under section 303 of this section, the court may at any time make any such order or orders, as it thinks fit.

(2) Without prejudice to the generality of subsection (1) of this section, the court may make one or more of the following orders, that is an order—

(*a*) authorising the applicant or any other person to control the conduct of the action ;

(*b*) giving directions for the conduct of the action ;

(*c*) directing that any amount adjudged payable by a defendant in the action shall be paid, in whole or in part, directly to former and present security holders of the company instead of to the company ;

(*d*) requiring the company to pay reasonable legal fees incurred by the applicant in connection with the proceedings.

Evidence of shareholders approval not decisive.

305. An application made or an action brought or intervened in under section 303 of this Decree shall not be stayed or dismissed by reason only that it is shown that an alleged breach of a right or a duty owed to the company has been or may be approved by the shareholders of such company, but evidence of approval by the shareholders may be taken into account by the Court in making an order under section 304 of this Decree.

Court's approval to discontinue.

306. An application made or an action brought or intervened in under section 303 of this Decree shall not be stayed, discontinued, settled or dismissed for want of prosecution without the approval of the court given upon such terms as the court thinks fit and, if the court determines that the rights of any applicant may be substantially affected by such stay, discontinuance, settlement or dismissal, the court may order any party to the application or action to give notice to the applicant.

No security for costs.

307. An applicant shall not be required to give security for costs in any application made or action brought or intervened in under section 303 of this Decree.

Interim costs.

308. In an application made or an action brought or intervened in under section 303 of this Decree, the court may at any time order the company to pay to the applicant interim costs before the final disposition of the application or action.

Definition.

309. In sections 303 to 308 of this Decree, "applicant" means—

(*a*) a registered holder or a beneficial owner and a former registered holder or beneficial owner, of a security of a company ;

(*b*) a director or an officer or a former director or officer of a company ;

(*c*) the Commission ; or

(*d*) any other person who in the discretion of the court, is a proper person to make an application under section 303 of this Decree.

Relief on the grounds of unfairly prejudicial and oppressive conduct

Application.

310.—(1) An application to the Court by petition for an order under section 311 of this Decree in relation to a company may be made by any of the following persons—

(*a*) a member of the company ;

(*b*) a director or officer or former director or officer of the company ;

(*c*) a creditor ;

(*d*) the Commission ; or

(*e*) any other person who, in the discretion of the court, is the proper person to make an application under section 311 of this Decree.

(2) In sections 311 to 313 of this Decree, "member" includes—

(*a*) the personal representative of a deceased member ; and

(*b*) any person to whom shares have been transferred or transmitted by operation of law.

Grounds upon which an application may be made.

311.—(1) An application for relief on the ground that the affairs of a company are being conducted in an illegal or oppressive manner may be made to the court by petition.

(2) An application to the court by petition for an order under this section in relation to a company may be made—

(*a*) by a member of the company who alleges—

(*i*) that the affairs of the company are being conducted in a manner that is oppressive or unfairly prejudicial to, or unfairly discriminatory against, a member or members, or in a manner that is in disregard of the interests of a member of the members as a whole ; or

(*ii*) that an act or omission or a proposed act or omission, by or on behalf of the company or a resolution, or a proposed resolution, of a class of members, was or would be oppressive or unfairly prejudicial to, or unfairly discriminatory against, a member or members or was or would be in a manner which is in disregard of the interests of a member or the members as a whole ; or

(*b*) by any of the persons mentioned under paragraphs (*b*) (*c*) and (*e*) of subsection (1) of section 310 of this Decree who alleges—

(*i*) that the affairs of the company are being conducted in a manner oppressive or unfairly prejudicial to or discriminatory against or in a manner in disregard of the interests of that person ;

(*ii*) that an act or omission, or a proposed act or omission was or would be oppressive or unfairly prejudicial to, or unfairly discriminatory against, or which is in a manner in disregard of the interests of that person, or

(*c*) by the Commission in a case where it appears to it in the exercise of its powers under the provisions of this Decree or any other enactment that—

(*i*) the affairs of the company are being conducted in a manner that is oppressive or unfairly prejudicial to, or unfairly discriminatory against a member or members or in a manner which is in disregard of the public interest ; or

(*ii*) any actual or proposed act or omission of the company (including an act or omission on its behalf) which was or would be oppressive, or unfairly prejudicial to, or unfairly discriminatory against a member or members in a manner which is in disregard of the public interests.

Powers of the court

312.—(1) If the court is satisfied that a petition under sections 310 and 311 of this Decree is well founded, it may make such order or orders as it thinks fit for giving relief in respect of the matter complained of.

(2) Without prejudice to the generality of subsection (1) of this section, the court may make one or more of the following orders that is, an order—

(*a*) that the company be wound up;

(*b*) for regulating the conduct of the affairs of the company in future ;

(*c*) for the purchase of the shares of any member by other members of the company ;

(*d*) for the purchase of the shares of any member by the company and for the reduction accordingly of the company's capital ;

(*e*) directing the company to institute, prosecute, defend or discontinue specific proceedings, or authorizing a member or members or the company to institute, prosecute, defend or discontinue specific proceedings in the name or on behalf of the company ;

(*f*) varying or setting aside a transaction or contract to which the company is a party and compensating the company or any other party to the transaction or contract ;

(*g*) directing an investigation to be made by the Commission ;

(*h*) appointing a receiver or a receiver and manager of property of the company ;

(*i*) restraining a person from engaging in specific conduct or from doing a specific act or thing ;

(*j*) requiring a person to do a specific act or thing.

(3) Where an order that a company be wound up is made under this section, the provisions of this Decree relating to winding up of companies shall apply, with such adaptations as are necessary, as if the order had been made upon an application duly filed in the court by the company.

(4) Where an order under this section makes any alteration in addition to the memorandum or articles of a company, then, notwithstanding anything in any other provision of this Decree but subject to the provisions of the order, the company shall not have power, without the leave of the court, to make any further alteration or addition to the memorandum and articles inconsistent with the provisions of the order but, subject to the foregoing provisions of this subsection, the alteration or addition shall have effect as if it had been duly made by a resolution of the company.

(5) A certified true copy of an order made under this section altering or giving leave to alter, a company's memorandum or articles shall, within 14 days from the making of the order or such longer period as the court may allow, be delivered by the company to the Commission for registration; and if the company makes default in complying with the provisions of this subsection, the company and every officer of it who is in default shall be guilty of an offence and liable to a fine of ₦50 and, for continued contravention, to a daily default fine of ₦25.

Penalty for failure to comply with order of the court.

313. Any person who contravenes or fails to comply with an order made under section 312 of this Decree that is applicable to him shall be guilty of an offence and be liable to a fine of ₦500 or imprisonment for one year or to both such fine and imprisonment.

Investigation of companies and their affairs

Investigation of a company on its own application or that of its members.

314.—(1) The Commission may appoint one or more competent inspectors to investigate the affairs of a company and to report on them in such manner as it may direct.

(2) The appointment may be made—

(*a*) in the case of a company having a share capital on the application of members holding not less than one-quarter of the class of shares issued ;

(*b*) in the case of a company not having a share capital, on the application of not less than one quarter in number of the persons on the company's register of members ; and

(*c*) in any other case, on application of the company.

(3). The application shall be supported by such evidence as the Commission may require for the purpose of showing that the applicant or applicants have good reason for requiring the investigation.

Other investigations of company.

315.—(1) The Commission shall appoint one or more competent inspectors to investigate the affairs of a company and report on them in such manner as it directs, if the Court by order declares that its affairs ought be so investigated.

(2) The Commission may make such an appointment if it appears to it that there are circumstances suggesting that—

(*a*) the company's affairs are being or have been conducted with intent to defraud its creditors or the creditors of any other person, or in a manner which is unfairly prejudicial to some part of its members ; or

(*b*) any actual or proposed act or omission of the company (including an act or omission on its behalf) is or would be so prejudicial, or that the company was formed for any fraudulent or unlawful purpose or ;

(*c*) persons concerned with the company's formation or the management of its affairs have in connection therewith been guilty of fraud, misfeasance or other misconduct towards it or towards its members ; or

(*d*) the company's members have not been given all the information with respect to its affairs which they might reasonably expect.

(3) Subsections (1) and (2) of this section shall be without prejudice to the powers of the Commission under section 322 of this Decree and the power conferred by subsection (2) of this section, shall be exercisable with respect to a body corporate notwithstanding that it is in course of being voluntarily wound up.

(4) Reference in subsection (2) of this section to a company's members includes any of the following persons—

(*a*) the personal representatives of a deceased member ; and

(*b*) any person to whom shares have been transferred or transmitted by operation of law.

Inspectors' powers during investigation.

316.—(1) If an inspector appointed under section 314 or 315 of this Decree to investigate the affairs of a company thinks it necessary for the purposes of his investigation to investigate also the affairs of another body corporate which is or at any relevant time has been the company's subsidiary or holding company or a subsidiary of its holding company or a holding company of its subsidiary, he shall report on the affairs of the other body corporate so far as he thinks that the results of his investigation of its affairs are relevant to the investigation of the affairs of the company first mentioned above.

(2) An inspectors appointed under either section 314 or 315 of this Decree may at any time in the course of his investigation, without the necessity of making an interim report, inform the Commission of matters coming to his knowledge as a result of the investigation tending to show that an offence has been committed.

Expenses of investigation.

324.—(1) The expenses of an incidental to an investigation by an inspector appointed by the Commission under the foregoing provisions of this Decree, shall be defrayed in the first instance out of the Consolidated Revenue Fund, but the following persons shall, to the extent mentioned, be liable to make repayment, that is to say—

(*a*) any person who is convicted on a prosecution instituted, as a result of the investigation by the Attorney-General of the Federation, or who is ordered to pay damages or restore any property in proceedings brought by virtue of subsection (3) of section 322 of this Decree, may in the same proceedings be ordered to pay the said expenses to such extent as are specified in the order ;

(*b*) any body corporate in whose name proceedings are brought as aforesaid shall be liable to the extent of the amount or value of any sums or property recovered by it as a result of those proceedings ;

(*c*) unless as the result of the investigation a prosecution is instituted by the Attorney-General of the Federation, the applicants for the investigation, where the inspector was appointed under section 314 of this Decree shall be liable to such extent (if any) as the Commission may direct ;

and any amount for which a body corporate is liable by virtue of paragraph (*b*) of this subsection, shall be a first charge on the sums or property mentioned in that paragraph.

(2) for the purposes of this section, any costs or expenses incurred by the Commission in or in connection with proceedings brought by virtue of subsection (2) of section 321 of this Decree, shall be treated as expenses of the investigation giving rise to the proceedings.

(3) Expenses to be defrayed by the Commission under this section shall, so far as not recovered thereunder be paid out of the appropriate Consolidated Revenue Fund.

Appointment, etc. of inspectors to investigate ownership of a company.

326.—(1) Where it appears to the Commission, that there is good reason so to do, it may appoint one or more competent inspectors to investigate and report on the membership of any company and otherwise with respect to the company for the purpose of determining the true persons who are or have been financially interested in the success or failure (real or apparent) of the company or able to control or materially to influence the policy of the company.

(2) The appointment of an inspector under this section may define the scope of his investigation, whether as respects the matter or the period to which it is to extend or otherwise and in particular may limit investigation to matters connected with particular shares or debentures.

(3) Where an application for an investigation under this section with respect to particular shares or debentures of a company is made to the Commission by members of the company and the number of applicants or the amount of the shares held by them is not less than that required for an application for the appointment of an inspector under paragraphs (*a*) and (*b*) of subsection (2) of section 314 of this Decree—

(*a*) the Commission shall appoint an inspector to conduct the investigation unless it is satisfied that the application is vexatious ; and

(*b*) the inspector's appointment shall not exclude from the scope of his investigation any matter which the application seeks to include except in so far as the Commission is satisfied that it is reasonable for the matter to be investigated.

(4) Subject to the terms of an inspector's appointment, his powers shall extend to the investigation of any circumstances suggesting the existence of an arrangement or understanding which, though not legally binding, is or was observed or likely to be observed in practice and which is relevant to the purposes of his investigation.

327.—(1) For the purposes of any investigation under section 326 of this Decree, the provisions of sections 316 to 320 inclusive of this Decree shall apply with the necessary modifications to references to the affairs of the company or to those of any body corporate, so however, that—

(*a*) the said sections shall apply in relation to all persons who are or have been, or whom the inspector has reasonable cause to believe to be or have been, financially interested in the success or failure or the apparent success or failure of the company or any other body corporate whose membership is investigated with that of the company, or able to control or materially to influence the policy thereof, including persons concerned only on behalf of others, as they apply in relation to officers and agents of the company or of the other body corporate, as the case may be ; and

(*b*) the Commission shall not be bound to furnish the company or any other person with a copy of any report by an inspector appointed under this section or with a complete copy thereof if he is of opinion that there is good reason for not divulging the contents of the reports or of part thereof, but shall keep a copy of any such report, or, as the case may be, the parts of any report, as regards which he is not of that opinion.

(2) The expenses of any investigation under section 326 of this Decree shall be defrayed out of the Consolidated Revenue Fund.

APPENDIX B

British *Companies Act* 1985 Cap. 6
(Provisions on the Unfair Prejudice Remedy.)

Relevant extracts from British Law Reform Commission, *Shareholders Remedies. A Consultation Paper* (Consultation Paper No 142) (London: Stationery Office, 1996)

...

Section 459

(1) A member of a company may apply to the court by petition for an order under this Part on the ground that the company's affairs are being or have been conducted in a manner which is unfairly prejudicial to the interests of its members generally or of some part of its members (including at least himself) or that any actual or proposed act or omission of the company (including an act or omission on its behalf) is or would be so prejudicial.

(2) The provisions of this Part apply to a person who is not a member of a company but to whom shares in the company have been transferred or transmitted by operation of law, as those provisions apply to a member of the company; and references to a member or members are to be construed accordingly.

(3) In this section (and so far as applicable for the purposes of this section, in section 461(2)) "company" means any company within the meaning of this Act or any company which is not such a company but is a statutory water company within the meaning of the Statutory Water Companies Act 1991.

Section 460

(1) If in the case of any company—

(a) the Secretary of State has received a report under section 437, or exercised his powers under section 447 or 448 of this Act or section 43A or 44(2) to (6) of the Insurance Companies Act 1982, and

(b) it appears to him that the company's affairs are being or have been conducted in a manner which is unfairly prejudicial to the interests of its members generally or of some part of its members, or that any actual or proposed act or omission of the company (including an act or omission on its behalf) is or would be so prejudicial, he may himself (in addition to or instead of presenting a petition for the winding up of the company) apply to the court by petition for an order under this Part.

(2) In this section (and, so far as applicable for its purposes, in the section next following) "company" means any body corporate which is liable to be wound up under this Act.

Section 461

(1) If the court is satisfied that a petition under this Part is well founded, it may make such order as it thinks fit for giving relief in respect of the matters complained of.

(2) Without prejudice to the generality of subsection (1), the court's order may-

(a) regulate the conduct of the company's affairs in the future,

(b) require the company to refrain from doing or continuing an act complained of by the petitioner or to do an act which the petitioner has complained it has omitted to do,

(c) authorise civil proceedings to be brought in the name and on behalf of the company by such person or persons and on such terms as the court may direct.

(d) provide for the purchase of the shares of any members of the company by other members or by the company itself and, in the case of a purchase by the company itself, the reduction of the company's capital accordingly.

APPENDIX C

COMPARATIVE ANALYSIS: SHAREHOLDERS DERIVATIVE ACTION IN NIGERIA AND CANADA

REQUIREMENTS	CANADA	NIGERIA	BRITISH COMMON LAW
1. Capacity/Locus	1. a. Registered holder b. Beneficial owner c. Former registered holder d. Former beneficial owner of a share of a company or its affiliates s.238, CBCA.	1. a. Registered holder b. Beneficial owner c. Former registered holder d. Former beneficial owner s.303, 309 and s.650.	Minority shareholders' action only available to present members of the company.
2. Requirement of leave to institute derivative action.	1. Leave required s.239(1)CBCA.	1. Leave required s.303(1)	1. Leave required to continue an action - *Prudential Association* v. *Newman*. See also Order 15, s.124 R.S.C.(U.K.)requires leave to continue if the defendant gives notice of intent to defend.

REQUIREMENTS	CANADA	NIGERIA	BRITISH COMMON LAW
3. Conditions for Grant of Leave	Conditions 1. Reasonable notice to directors of the company or its subsidiary of intention to apply to court if directors do not bring, diligently prosecute, defend or discontinue the action. s.239(2)(a). 2. Applicant is **acting** in good faith. s.239(2)(b) 3. It **appears** to be in the interests of the corporation or its subsidiary that the action be brought or defended or discontinued. s.239(2)(c)	Conditions 1. The wrongdoers are the directors who are in control and will not take "necessary action". s.303(2)(a) 2. Reasonable notice to directors of his intention to apply to court and the directors do not bring, diligently prosecute or defend or discontinue the action. s.303(2)(b) 3. Applicant is acting in good faith. s. 303(2)(c) 4. It appears to be in the interest of the corporation that the action be instituted or intervened. s.303(2)(d)	Conditions to Continue Action 1. *Prima facie* claim that the company is entitled to relief claimed. 2. That the action falls within the boundaries of the exceptions to the rule in *Foss* v. *Harbottle* see *Newman* case at 222.

REQUIREMENTS	CANADA	NIGERIA	BRITISH COMMON LAW
4. Orders	Court can make orders at any time of proceedings such as : a. Authorizing applicant to control the conduct of the suit. b. Giving directions for control of the suit. c. Directing any amount adjudged Payable by the defendant be paid in whole or part directly to present or former shareholders of the company or subsidiary instead of to the company. d. Requiring payment of reasonable legal fees incurred by the applicant in connection with the action. s.240(a),(b),(c),(d)	Court can make orders at any time as it thinks fit such as: a. Authorizing the applicant to control the action. b. Giving directions as to the conduct of the suit. c. Directing any amount adjudged payable by the defendant to be paid in whole or in part directly to the present or former shareholders of the company instead of to the company. d. Requiring payment of reasonable legal fees incurred by the applicant in connection with the action. s.304(1), 304(2)(a),(b),(c) and (d)	1. At common law the amount adjudged payable could not be paid to any of the shareholders directly. 2. The court could order payment of cost to the plaintiff/shareholder but this was not common. *Wallesterner* v. *Moir*, [1974] QB 373.

REQUIREMENTS	CANADA	NIGERIA	BRITISH COMMON LAW
5. Ratification and Derivative Action	1. Ratification of breach of right or duty alone is not a ground for stay or dismissal of derivative action but may be considered by court in making orders as in column 4. s.242(1)	1. Ratification of breach of right or duty alone is not a ground of stay or dismissal of derivative action but may be considered by it in making orders in column 4. s.305	1.Ratification of a wrong acts of directors, or the decision of shareholders not to sue bars further action by the company except such ratification or decision not to sue constitutes fraud on the minority shareholders. *Beattie* v. *Beattie,*[1938] Ch.708, *Smith* v. *Croft. (*No 2) [1987] 3 ALL.E.R.909.
6. Settlement and Discontinuance of Action	1. Approval of court required for stay, discontinuance or settlement of derivative action or dismissal for want of prosecution. s.242(2)	1. Court approval required for stay, discontinuance, settlement or dismissal for want of prosecution of derivative action. s.306	1. An action can be abandoned or compromised if independent organ of the corporation does not want the action to proceed. See *Smith* v. *Croft* (No.2), *Taylor* v. *Nat. Union of Mineworkers* (1985) BCLC 237.
7. Security for Cost	1. Applicant not required to give security for costs. s.242(3)	1. Applicant shall not be required to give security for costs. s.307	1.Applicant may be required to give security for costs.
8. Interim Costs	The court may order company to pay to the applicants interim costs including legal fees and disbursements. Applicant may be accountable for the interim costs on conclusion of suit. s.242(4)	1. Court may order the company to pay interim costs to the applicant before the final conclusion of the case.	1.The court very lately thought it reasonable that it may be necessary to award cost to the applicant. *Wallesteiner* v. *Moir* (No.2).

REQUIREMENTS	CANADA	NIGERIA	BRITISH COMMON LAW
9. Type of wrong covered	1. Any wrong which is actionable by the corporation, including breach of fiduciary duties and duties of skill and care.	1. Any wrong which is actionable by the corporation, including breaches of fiduciary duties and duties of skill and care.	1. At common law, the minority shareholders' action does not cover directors' breach of the duty of skill and care except the director personally benefited from the wrong. *Pavlides* v. *Jensen*, [1956] Ch. 565 and *Daniels* v. *Daniels*, [1978] 2 W.L.R. 73

APPENDIX D

Comparison of Oppression Remedy in Canada, Nigeria and Britain.

	Canada	Nigeria	Britain
1. STANDING	1.Registered holder or former registered holder of a security.	1.Members of company.	1. Members of the company.
	2.Beneficial owner of A security (shares).	2. Personal representatives of deceased shareholders.	2. Personal representatives.
	3.Affiliate companies.	3.Any person to whom shares have been transferred or transmitted by operation of law.	3. Any person to whom shares have been transfered or transmitted by operation of law.
	4.Directors and officers and former directors and officers.	4. **	4. **
		5.Directors and officers and former directors or officers of company.	5. **
	6.The Director.	6. The Corporate Affairs Commission.	6. Secretary of States.
	7.Creditors.	7.Creditors.	7. **
	8.Any other proper person.	8.Any other proper person.	8. **
	CBCA s. 238	CAMA, s. 310.	*Company Act* 1985 (Britain) ss. 459(1)&(2) and 460.

** Means no equivalent provision.

	Canada	Nigeria	Britain
2. **CONDUCT COVERED**	1. Acts or omission. 2. Business or affairs of the corporation. 3.Powers of directors of the company or affilliates. a. Oppressive. b. Unfairly rejudicial. c. Unfairly disregard. d. ** CBCA s. 241.	1.Affairs of the company. 2. Act or ommission. 3. Resolution by company. 4. Proposed act or ommission. a. Oppressive. b. Unfairly prejudicial. c. Disregard of interest. d. Unfairly discriminates. CAMA, s. 311(2)(a) &(b).	1. Affairs of the company. 2. Acts or ommission. 3. ** 4. Proposed act or ommission. a. ** b. Unfairly prejudicial. c. ** d. ** s. 459(1).
3. **BAD FAITH.**	Bad faith by the majority shareholder not required.	Bad faith by the majority shareholder not required.	Bad faith by the majority shareholder not required.

** Means no equivalent provision.

	Canada	Nigeria	Britain
4. **ORDERS OF COURT**	1. Not limited. 2. Examples of orders. a. Restraining the conduct complained of. b. Appointing Receiver or receiver manager. c. Amending articles or by-laws. d. Appointment or removal of directors. e. Varying or setting aside contracts or other transactions. f. production of financial statements. g. other orders are listed. CBCA s.241 (3).	1. Not limited. 2. Examples of orders. a. Winding of company. b. Regulating affairs of company. c. Purchase of shares of members. d. Order directing company to institute proceedings. e. Varying or setting aside or transactions. f. Directing investigations by company. g. other orders are listed. CAMA s. 312.	1. Not limited. 2. Examples of orders: a. Regulate the conduct of the company's budiness. b. Order the company to do or refrain from doing something. c. Order investigations into the conduct Of the company's affairs. d. Authorise civil proceedings on behalf of the company. d. Order purchase of shares of any member. e. Other orders. s. 461.

** Means no equivalent provision.

	Canada	Nigeria	Britain
5. CONTROL OF ACTION BY THE COURT	1. Shareholders approval not a bar to action. 2. Court approval required for settlement of suit. 3. Complainant not required to give security for cost. 4. Court may award interim cost against company or subsidiary. CBCA s.242.	1.** 2.** 3.** 4.**	1. ** 2. ** 3. ** 4. **

** Means no equivalent provision.